*Together with No. 196, American Chain Co., Inc. v. Eaton, Collector; and No. 329, Routzahn, Collector, v. Willard Storage Battery, Co.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 196

AMERICAN CHAIN COMPANY, INC., PETITIONER,

vs.

ROBERT O. EATON, COLLECTOR OF INTERNAL REVENUE, DISTRICT OF CONNECTICUT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

At Law. No. 3360

AMERICAN CHAIN COMPANY, INC., 929 Connecticut Avenue, Bridgeport, Connecticut, Plaintiff,

v.

ROBERT O. EATON, Collector of Internal Revenue of the United States of America for the District of Connecticut, Hartford, Connecticut, Defendant

COMPLAINT

UNITED STATES OF AMERICA,
District of Connecticut, ss:

The President of the United States of America to the Marshal of the District of Connecticut, Greeting:

You are hereby commanded to summon Robert O. Eaton, the Collector of Internal Revenue for the District of Connecticut, of North Haven in the State and District of Connecticut, defendant herein to appear before the District Court of the United States for the District of Connecticut on the first Monday of Sepember, 1929, then and [fol. 2] there to answer unto American Chain Company, Inc., a corporation under the laws of the State of New York, and having its principal office and place of business in Bridgeport in the County of Fairfield and State of Connecticut, plaintiff herein, in a civil action wherein the plaintiff complains and says:

1. That the plaintiff, at all times hereinafter mentioned, was and now is a corporation duly organized and existing under and by virtue of the laws of the State of New York, and having its principal office and place of business in said City of Bridgeport in the State of Connecticut, and within the United States Internal Revenue District of the State of Connecticut, and brings this action in its own right.

2. That the defendant is a citizen of the United States and a resident of said North Haven, County of New Haven, State of Connecticut, and was at all the times mentioned herein and now is a duly appointed, qualified and acting Collector of Internal Revenue of the United States of America for the District of Connecticut, in which District the City of Bridgeport is located.

3. That the plaintiff is and was at all times mentioned herein engaged in the manufacture and sale of tire chain grips together with other commodities, and that said grips are and were sold for, and used on, solid, and pneumatic tires of automotive vehicles, such as tractors, fire engines and equipment, snow plows, street sweepers, oilers, graders, etc. That said grips were manufactured to fit the [fol. 3] tires of automotive vehicles whether of tractors, fire engines, and vehicles not subject to the excise tax, or automobiles and trucks subject to tax within the purview of subdivision (3), Section 900 of Title IX, of the Revenue Act of 1921. That during the year 1923 it sold to its customers said tire chain grips having a general commercial use other than on the tires of automobiles, trucks, and automobile wagons and paid tax thereon at 5% as and in the amount herein alleged.

4. That an excise tax at the rate of 5% under Title IX, Section 900, subdivision (3) of the Act of Congress of the United States, entitled "Revenue Act of 1921," was assessed against the plaintiff on sales of said tire chain grips and paid by it to the defendant as Collector of Internal Revenue of the United States of America, aggregating the sum of Three hundred fifty-two thousand, one hundred eleven Dollars and fifty-one Cents ($352,111.51); that said payments made by plaintiff to defendant as its manufacturer's excise tax on the sales of tire chain grips made by it during the year 1923, were supposed by plaintiff to be due and payable to the United States of America and to said defendant as Collector of Internal Revenue, as demanded of plaintiff under and by virtue of the said subdivision (3) of Section 900 of Title IX of said Revenue Act of 1921; that the following is a schedule showing the amounts of payments made by plaintiff as above set forth, the months for which payments were made, and the dates on which the same were made:

[fol. 4]

1923	Amount of tax claimed as refund	Date of payment
January	$38,110.22	Feb. 27, 1923
February	14,718.93	Mar. 29, 1923
March	12,006.19	Apr. 28, 1923
April	6,885.62	May 29, 1923
May	16,87[illegible].91	June 29, 1923
June	42,578.80	July 30, 1923
July	39,381.35	Aug. 30, 1923
August	41,417.81	Sept. 28, 1923
September	33,299.13	Oct. 30, 1923
October	45,877.97	Nov. 28, 1923
November	36,818.58	Dec. 29, 1923
December	24,442.00	Jan. 30, 1924
	$352,111.51	

5. That said tax represents 5% of the invoice price of all tire chain grips sold by the plaintiff from January 1. to December 31, 1923, inclusive; that said tax was not paid either directly or indirectly by the purchaser of said grips, but was paid entirely by the plaintiff and said grips were sold to the customers of plaintiff at a flat price and no amount for excise tax was included therein; that plaintiff did not increase the price of said chain grips by the amount of the excise tax, but absorbed said amount of tax without passing it on to the purchasers.

[fol. 5] 6. That on or about the 9th day of February, 1927, the plaintiff filed with the defendant its claim for refund of the amount of $352,111.51 so paid to the defendant as Collector of Internal Revenue and more particularly set forth in the above schedule of payments. That on or about the 5th day of July, 1927, the then Acting Commissioner of Internal Revenue by notice to plaintiff rejected in full said claim for refund and refused to refund to plaintiff the said sum; that the defendant and the Commissioner of Internal Revenue have at all times since said date refused to refund to plaintiff the amount of said payments made by plaintiff to defendant as above set forth.

7. That said tire chain grips sold and used for the tires of automotive vehicles are of a design, shape, size and of dimensions exactly similar to chain grips used for the tires

of tractors, fire engines and equipment, and similar vehicles not subject to tax within the purview of subdivision (3), Section 900, of Title IX of the Revenue Act of 1921. That tire chain grips of exactly the same type and specifications as those sold by plaintiff and tax paid during said period can be and are now commonly and profitably used upon both taxable and non-taxable automotive vehicles; that there is nothing in the design and construction of said grips sold by plaintiff as herein alleged to make them primarily adapted only for use on tires of automobiles, trucks or automobile wagons and that said grips may be and are used for other purposes and especially for the tires of tractors, fire engines and similar equipment; that [fol. 6] the Commissioner of Internal Revenue has found and freely admitted to plaintiff that a substantial number of said tire chain grips were sold and used upon vehicles not subject to said tax but said Commissioner refuses to make refund of the tax paid as herein alleged on said grips so sold for the reason that the exact amount of sales therefor is not ascertainable; that said chain grips sold by plaintiff during said period were not sold on or in connection with automobile trucks, automobile wagons, automobiles and/or motorcycles, or in connection with the sale thereof; that said tire chain grips were not parts or accessories for automobile trucks, automobile wagons, other automobiles and/or motorcycles, within the intent and meaning of Section 900, Title IX of the Revenue Act of 1921 or any subdivision thereof, but were in fact commercial commodities interchangeable as to use on both taxable and non-taxable vehicles, were so advertised and were commonly sold for such general purposes.

Wherefore plaintiff prays judgment against the defendant in the amount of Three hundred fifty-two thousand one hundred eleven Dollars and fifty-one Cents ($352,111.51), with interest as follows:

On $38,110.22, from February 27 1923,
On $14,718.93, from March 29, 1923,
On $12,006.19, from April 28, 1923,
On $6,585.62, from May 29, 1923,
On $16,874.91, from June 29, 1923,
On $42,578.80, from July 30, 1923,
On $39,381.35, from August 30, 1923,

On $41,417.81, from September 28, 1923,
[fol. 7] On $33,299.13, from October 30, 1923,
On $45,877.97, from November 28, 1923,
On $36,818.50, from December 29, 1923,
On $24,442.00, from January 30, 1924.

Sanford Stoddard of Bridgeport is recognized in the sum of $150.00 to prosecute, etc.

Hereof fail not, but of this writ due notice and return make.

Witness the Honorable Edwin S. Thomas, Judge of the District Court of the United States, for the District of Connecticut, and the seal of said Court, at New Haven in said District, the 2nd day of July, A. D. 1929.

(Signed) C. E. Pickett, Clerk of the District Court of the United States for the District of Connecticut. David S. Day, Attorney for Plaintiff, Office and Post Office Address, 886 Main Street, Bridgeport, Connecticut. Long, Chamberlain and Nyce, of Counsel, Washington, D. C.

[fol. 8] IN UNITED STATES DISTRICT COURT

Law. No. 3360.

[Title omitted]

MOTION TO DISMISS

The defendant herein respectfully moves this Court to dismiss the Complaint heretofore filed in this action for the following reasons:

1. The provisions of Section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of refund of manufacturer's excise tax, paid or collected under the provisions of Section 900 (3) of the Revenue Act of 1921, in an action instituted subsequent to April 30, 1928.

2. The provisions of Section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of instituting and maintaining an action for the recovery of manufacturer's excise tax, paid or collected under the provisions of Section 900 (3) of the Revenue Act of 1921, subsequent to May 29, 1928, the effective date of such act.

3. The provisions of Section 424 of the Revenue Act of 1928 vest a discretionary power in the Commissioner of Internal Revenue which this Court is without jurisdiction to review.

[fol. 9] 4. The provisions of Section 424 of the Revenue Act of 1928 provide an exclusive remedy for the recovery of manufacturer's excise tax paid or collected under the provisions of Section 900 (3) of the Revenue Act of 1921.

Dated at Hartford, this 18th day of July, A. D. 1929.

John Buckley, United States Attorney. George H. Cohen, Asst. United States Attorney, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT, DISTRICT OF CONNECTICUT

At Law. Nos. 3360, 3371, 3421.

AMERICAN CHAIN COMPANY

v.

ROBERT O. EATON, Collector

MEMORANDUM OF DECISION ON MOTIONS TO DISMISS

These cases are before the Court on defendant's motions to dismiss all three suits which are actions at law brought against the Internal Revenue Collector to recover, in each [fol. 10] instance, a manufacturer's excise tax paid by the plaintiff, a manufacturer of chain grips, under the provisions of Section 900(3) of the Revenue Act of 1921 and 600(3) of the Revenue Act of 1924, for the taxable periods from January to December, 1923, inclusive,—July to December, 1922, inclusive and from January to June, 1924, inclusive,—in the amounts of $352,111.51, $183,365.49 and $105,031.43, respectively.

While the motions to dismiss do not, in terms, challenge the jurisdiction of this Court, nevertheless, they must be so regarded to escape denial eo instanti. In this jurisdiction the method of attacking the sufficiency of a pleading is by demurrer,—and as these are all actions at law, the practice of the Connecticut Courts governs. However, in spite of his failure to clearly and definitely allege, in his motions,

that this Court has no jurisdiction either of the parties or of the subject matter, the defendant has in his brief expressly taken the position that these motions address themselves, not to the sufficiency of the complaints, but to the scope of our jurisdiction, and we may therefore overlook the inartificial phrasing of the motions which read:

"1. The provisions of Section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of refund of manufacturer's excise tax, paid or collected under the provisions of Section 900 (3) of the Revenue Act of 1921, in an action instituted subsequent to April 30, 1928.

[fol. 11] "2. The provisions of Section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of instituting and maintaining an action for the recovery of manufacturer's excise tax, paid or collected under the provisions of Section 900 (3) of the Revenue Act of 1921, subsequent to May 29, 1928, the effective date of such Act.

"3. The provisions of Section 424 of the Revenue Act of 1928 vest a discretionary power in the Commissioner of Internal Revenue which this Court is without jurisdiction to review.

"4. The provisions of Section 424 of the Revenue Act of 1928 provide an exclusive remedy for the recovery of manufacturer's excise tax paid or collected under the provisions of Section 900 (3) of the Revenue Act of 1921."

Before inquiring into the cogency of these assertions, let us briefly restate the material allegations of the complaint. The plaintiff, a corporation organized under the laws of the State of New York, with its principal office in Bridgeport, in this District, brings these actions against the defendant, a citizen of the United States and a resident of the State of Connecticut, to recover a sum in excess of $3,000 alleged to have been unlawfully received by the defendant. Whether these actions be regarded as one ex delicto or ex contractu—whether they are justified under the revenue laws of the United States or under the principles of the com-
[fol. 12] mon law,—or whether they are untenable on any known theory, is not the question before me. We are not now examining the sufficiency of the allegations to make out a cause of action. What we have here is a claim for a money recovery in excess of the jurisdictional amount of

$3,000 set forth in an action at law brought by a citizen of the State of New York against a resident of the State of Connecticut. It can hardly be denied that there is enough alleged upon which to found jurisdiction, even if there be nothing more than a jurisdiction to dismiss for failure to state a cause of action.

But jurisdiction need not rest upon a diversity of citizenship which, after all, happens here to be but a fortuitous incident. The plaintiff alleges that it is a manufacturer of chain grips for automobile tires and other commodities and that the chain grips were used on tires of all kinds of automotive vehicles, many of which were not subject to the excise tax on automobiles within the purview of Section 900 (3) of the Revenue Act of 1921. The plaintiff, however, paid the 5% tax on its sales assessed against it on the invoice price of all tire chain grips, which tax was not passed, directly or indirectly, on to the purchasers of said chain grips which fact had been established to the satisfaction of the Commissioner of Internal Revenue. There are the usual allegations of the filing of a claim for refund and the disallowance of the claim by the Internal Revenue Commissioner.

The first objection urged to the jurisdiction of the Court is that Section 424 of the Revenue Act of 1928 deprived the [fol. 13] "plaintiff of its privilege of refund" * * * "in an action instituted subsequent to April 30, 1928." With the accuracy of this, as a statement of law, I am not now concerned. I should say that, conceding its validity, it furnishes no basis for attacking the jurisdiction of the Court. It embodies either a criticism of the sufficiency of the complaint or a defense in the nature of the statute of limitations. There is nothing either in the text of the statute itself, or in its rather free rendering,—in the language of the defendant's objection, which even remotely restricts the grant of jurisdiction legislated to this Court and delimited in the United States Judicial Code.

The second objection is identical with the first, excepting that the limitation is fixed at May 29, 1928, instead of April 30, 1928.

The third objection alleges that the Commissioner of Internal Revenue has sole discretion in the matter of refunding the excise tax, which discretion is not subject to judicial review. But this again, in its essence, is an objection to

the sufficiency of the case made out by the plaintiff rather than a critique of our jurisdiction. If, however, it is intended to assert that Section 424 of the Revenue Act of 1928 embodies a prohibition against the exercise of a jurisdiction elsewhere granted then I overrule this contention. I find nothing in the language of that statute which expressly, or by implication, warrants such a conclusion. At most the statute presents a perfect defense to such an action, or, perhaps, a good ground for dismissing for insuf- [fol. 14] ficiency. The same observation applies to the fourth ground set forth in the motion.

The defendant cites and relies upon Sterling Spring Company v. Routzahn, decided May 8, 1929, by Judge Jones in the Northern District of Ohio. A reading of the opinion in that case leaves this Court somewhat uncertain as to whether the learned Judge intended to hold that the District Court had no jurisdiction to entertain the action or that the complaint was insufficient in law. The ground of the motion to dismiss was that "recovery is precluded under Section 424, etc." It is elementary that such an attack goes to the merits of the alleged cause of action and not to the jurisdiction of the Court in the premises. If that decision was intended as a pronouncement on jurisdiction then I am constrained to disagree with it.

In a later decision in the same District rendered in Willard Storage Battery Co. v. Routzahn, Judge West referred to the Sterling Spring case and took pains to announce that Judge Jones had, in conference with him, declared that his decision was not to be regarded as the law of the District. In the Willard Storage Battery case Judge West reached an opposite conclusion, and in so far as that conclusion sustains the jurisdiction of the Court, I am in accord with it. See also Boyle Valve Company v. United States, 38 Fed. (2d) 135; Jefferson Electric Manufacturing Co. v. United States, 38 Fed. (2d) 139, where it was held by the Court of Claims that Section 424 of the Revenue Act of 1928 did not prevent the filing of suits under the General Refund Act, [fol. 15] and that the action of the Commissioner of Internal Revenue under Section 424 was not conclusive and that the taxpayer, after the rejection of the claim, could maintain a suit in Court for refund.

At this time I express no opinion on the sufficiency of the complaint. The occasion for that will arise if and when

the proper procedure has been invoked. There is no question raised here but one of jurisdiction and none other is decided. It follows, therefore, that all three motions to dismiss in each instance are denied.

Submit Order Accordingly.

February 5, 1931.

Edwin S. Thomas, U. S. D. J.

[fol. 16] IN UNITED STATES DISTRICT COURT

Law. No. 3360.

[Title omitted]

ORDER OVERRULING DEFENDANT'S MOTION TO DISMISS

This action, by writ and complaint claiming $352,111.51 damages, came to this court on the first Monday of September, 1929 and thence to the present time, when the parties appeared and were at issue on the defendant's motion to dismiss as on file.

The court, having heard the parties, finds the issues for the plaintiff, and orders that the defendant's motion to dismiss be denied.

Dated at New Haven this 1st day of June, 1931.

Edwin S. Thomas, U. S. D. J.

[fol. 17] IN UNITED STATES DISTRICT COURT

Law. No. 3360

[Title omitted]

ANSWER

Paragraph one of plaintiff's petition is admitted except defendant denies plaintiff brings this action in its own right.

Paragraph two of plaintiff's petition is admitted.

With respect to paragraph three of plaintiff's petition, defendant admits and alleges that plaintiff is and was at

all times mentioned herein engaged in the manufacture and sale of chain grips and that said grips are and were primarily designed, manufactured, advertised, sold for and used on solid and pneumatic tires of automotive vehicles such as automobiles trucks, automobile wagons, other automobiles and motorcycles, but defendant denies such chain grips were sold for and used on tractors, fire engines and equipment, snow plows, street sweepers, oilers, graders, etc. Further answering paragraph three defendant admits and alleges that said chain grips were designed, manufactured, advertised, and sold to fit the tires of automotive vehicles such as automobile trucks, automobile wagons, [fol. 18] other automobiles, and motorcycles as parts or accessories thereof within the purview of Section 900 of the Revenue Act of 1921, but defendant denies that such grips were designed, manufactured and sold for use on tractors, fire engines and vehicles not subject to excise tax. Further answering paragraph three defendant admits and alleges that during the year 1923 plaintiff sold to its customers namely, jobbers and distributors, said chain grips primarily designed, manufactured, and advertised for use on automobile trucks, automobile wagons, other automobiles and motorcycles and that plaintiff paid tax thereon at the rate of 5% in the amount of $352,111.51, but defendant specially denies that said chain grips have or had a general commercial use and defendant specially denies said chain grips were sold for use or used on other than the tires of automobile trucks, automobile wagons, other automobiles, and motorcycles.

Paragraph four of plaintiff's petition is admitted.

Defendant denies the averments of paragraph five of plaintiff's petition and alleges that the tax in question represents the amount shown on the manufacturer's excise tax returns filed by and assessed against plaintiff for each of the taxable periods involved.

Paragraph six of plaintiff's petition is admitted.

Defendant denies the averments of paragraph seven of plaintiff's petition and alleges that the chain grips manufactured and sold by plaintiff during the taxable periods in question, upon the sale of which tax in question was imposed, were primarily designed, manufactured, advertised, and sold for use on or in connection with automobile trucks, automobile wagons, other automobiles, and motorcycles as

[fol. 19] parts or accessories thereof within the meaning of the provisions of Section 900 of the Revenue Act of 1921.

—— ——, Defendant, by John Buckley, United States Attorney; George H. Cohen, Assistant United States Attorney, His Attorneys.

IN UNITED STATES DISTRICT COURT

LAW. No. 3360

[Title omitted]

PLAINTIFF'S REPLY

The plaintiff denies the allegations contained in the defendant's answer.

—— ——, Plaintiff, by Marsh, Stoddard & Day, Its Attorneys.

[fol. 20] IN UNITED STATES DISTRICT COURT

At Law. No. 3360

[Title omitted]

STIPULATION WAIVING TRIAL BY JURY

It is hereby stipulated and agreed by and between the parties herein that the trial of this cause by jury is hereby waived, and it is agreed that all issues therein may be determined by the court sitting without a jury.

Dated at New Haven, Connecticut, this 27th day of October, 1931.

—— ——, Plaintiff, by Long, Chamberlain & Nyce, Marsh, Stoddard & Day, Its Attorneys. —— ——, Defendant, by George H. Cohen, Asst. U. S. Attorney, His Attorney.

[fol. 21] IN UNITED STATES DISTRICT COURT

No. 3360

[Title omitted]

MOTION FOR JUDGMENT

The defendant herein respectfully moves this court for judgment in favor of the defendant and against the plaintiff, for the following reasons:

1. Plaintiff has failed to show by the evidence the particular sales upon which it paid excise taxes, for the taxable periods January, 1923, to December, 1923, inclusive.

2. Plaintiff has failed to show by the evidence the particular sizes, types and weights of "Weed Chains" upon the sales of which excise taxes were imposed for the taxable periods January, 1923, to December, 1923, inclusive.

3. Plaintiff has failed to show by the evidence the numbers of "Weed Chains" sold by plaintiff to the consumer for use on other than automobile trucks, automobile wagons, or other automobiles during the taxable periods January, 1923, to December, 1923, inclusive.

[fol. 22] 4. Plaintiff has failed to show by the evidence the amount of tax paid on sales of "Weed Chains" by plaintiff to the consumer for use on other than automobile trucks, automobile wagons, or other automobiles for the taxable periods January, 1923, to December, 1923, inclusive.

5. Plaintiff has failed to show by the evidence the number, sizes, types and weights of "Weed Chains" sold by plaintiff to the consumer for use on other than automobile trucks, automobile wagons, or other automobiles during the taxable periods January, 1923, to December, 1923, inclusive.

6. Plaintiff has failed to show by the evidence the "Weed Chains" manufactured and sold by it during the taxable periods, January, 1923, to December, 1923, inclusive, were not designed to be attached to or used in connection with automobile trucks, automobile wagons or other automobiles to add to their utility or ornamentation.

7. Plaintiff has failed to show by the evidence the "Weed Chains", manufactured and sold by it during the taxable periods January, 1923, to December, 1923, inclusive, were not primarily adapted for use in connection with automobile trucks, automobile wagons, or other automobiles, whether or not essential to the operation or use of such vehicles.

8. Plaintiff has failed to sustain the burden of proof placed upon it in this action.

[fol. 23] 9. Plaintiff has failed to show by the evidence it has fully complied with the provisions of the Revenue Act of 1921 and Regulations 47 of the Treasury Department promulgated thereunder in that it has failed to avail itself of the exemption provisions of such Act and Articles 15 and 16 of such Regulations.

10. The evidence conclusively shows the "Weed Chains", manufactured and sold by plaintiff during the taxable periods, January, 1923, to December, 1923, inclusive, the sales of which were taxed, were designed to be attached to or used in connection with automobile trucks, automobile wagons, or other automobiles, to add to their utility or ornamentation.

11. The evidence conclusively shows the "Weed Chains", manufactured and sold by plaintiff during the taxable periods, January, 1923, to December, 1923, inclusive, were primarily adapted for use in connection with automobile trucks, automobile wagons, or other automobiles, whether or not essential to the operation or use of such vehicles.

12. The provisions of Section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of refund in this action of manufacturer's excise tax paid or collected under the provisions of Section 900(3) of the Revenue Act of 1921.

13. The provisions of Section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of instituting and [fol. 24] maintaining this action, for the recovery of manufacturer's excise tax paid or collected under the provisions of Section 900 (3) of the Revenue Act of 1921, subsequent to May 29, 1928.

14. The provisions of Section 424 of the Revenue Act of 1928 vest certain specified discretionary powers in the

commissioner of Internal Revenue which this Court is without jurisdiction to determine or review.

15. The provisions of Section 424 (a) (1) of the Revenue Act of 1928 limit the jurisdiction of this court, to hear and determine the issues in an action for the recovery of manufacturer's excise taxes paid or collected under the provisions of Section 900(3) of the Revenue Act of 1921, to actions instituted prior to April 30, 1928.

16. The provisions of Section 424 of the Revenue Act of 1928 provide a remedy for the recovery of manufacturer's excise tax paid or collected under the provisions of Section 900(3) of the Revenue Act of 1921, which is exclusive of all other remedy.

17. The provisions of Section 424 of the Revenue Act of 1928 preclude recovery in this action of manufacturer's excise tax paid or collected under the provisions of Section 900(3) of the Revenue Act of 1921, regardless of the non-taxable claims of the plaintiff.

18. The plaintiff has failed to show by the evidence that the uses to which the "Weed Chains", manufactured and sold by it during the taxable periods, January, 1923, to [fol. 25] December, 1923, inclusive, other than their use in connection with automobile trucks, automobile wagons, or other automobiles, required chains of the same design, type, size, weight, hardness, and tensile strength as is required for automobile truck, automobile wagon or other automobile uses.

19. Plaintiff has failed to show by the evidence that the tax in question in this action was imposed upon sales by its distributors, jobbers, or dealers to the consumer during the taxable periods, January, 1923, to December, 1923, inclusive.

20. Plaintiff has failed to show by the evidence that the chains manufactured and sold by it during the taxable periods January, 1923, to December, 1923, were sold by plaintiff to the consumer for use on other than automobile trucks, automobile wagons or other automobiles.

E. F. McMahon.

[fol. 26] IN UNITED STATES DISTRICT COURT, DISTRICT OF CONNECTICUT

Law. Nos. 3360, 3371, 3421

AMERICAN CHAIN COMPANY, INC., Plaintiff,

v.

ROBERT O. EATON, Collector of Internal Revenue, Defendant

Long, Chamberlain & Nyce (Chester I. Long, Esq., and Charles P. Swindler, Esq., of counsel), all of Washington, D. C., and

Marsh, Stoddard & Day (David S. Day, Esq., of counsel), both of Bridgeport, Connecticut, for Plaintiff.

C. M. Charest, General Counsel, Bureau of Internal Revenue, E. F. McMahon, Special Attorney, Bureau of Internal Revenue, both of Washington, D. C., and John Buckley, United States Attorney, and George H. Cohen, Assistant United States Attorney, both of Hartford, Connecticut, for Defendant.

OPINION OF JUDGE HINCKS

These are three actions brought by a corporation of New York against the Collector of Internal Revenue for this [fol. 27] District for the recovery of excise taxes exacted by the Commissioner and paid by the plaintiff upon the sale of Weed tire chains for automotive vehicles. The actions are identical as to the pleadings, the only difference being that each action covers a different taxable period. Thus case No. 3371, begun in August 1929, seeks recovery of the tax paid for the taxable period of July 1 to December 31, 1922, in the amount of $183,365.49, with interest. Case No. 3360, begun in July 1929, seeks recovery of the tax paid for the taxable period of January 1 to December 31, 1923, in the amount of $352,111.51, with interest. And Case No. 3360, begun in July 1929, seeks recovery of the tax paid for the taxable period of January 1 to June 30, 1924, in the amount of $105,031.43, with interest.

The cases were brought on together for trial before a jury, but at the close of the plaintiff's case, at the suggestion of the court, both parties waived their right to jury trial, and the remainder of the evidence, and the issues

both of fact and of law, were submitted to the Court for decision.

The Pleadings

The complaint in each case alleges that the plaintiff is a corporation engaged in the manufacture and sale of tire chains such as are commonly used on the tires of automotive vehicles; and that during the respective taxable periods it sold a large number of said chains; that under the Revenue Acts of 1921 and 1924 a tax of 5 per cent [fol. 28] was assessed upon such sales and subsequently collected; that the plaintiff duly filed its claim for refund, which was rejected and denied by the Commissioner of Internal Revenue. As to the foregoing allegations there was no dispute. The only issues were raised by the defendant's denial addressed to Paragraphs 1, 5 and 7 of the complaint.

Paragraph 1 alleged that the plaintiff "brings this action in its own right." The allegation was supported by credible testimony on the part of the plaintiff, and was not disputed by the defendant on the trial. Doubtless the contention involved was tacitly abandoned by the defendant. In any event, on the evidence as to this issue I find in favor of the plaintiff, and the issue may be laid out of a further consideration of the case.

Paragraph 5 of the complaint alleged that the taxes in question were paid entirely by the plaintiff, and neither directly nor indirectly by the plaintiff's purchasers. These allegations also were denied.

As to this issue, I find that for the taxable period involved in case No. 3371, the plaintiff has sustained the burden of proof. The evidence on this issue relating to the periods involved in cases Nos. 3360 and 3421, disclosed that the plaintiff at some time during the period between January 1 and December 31, 1923, reduced its sale prices by the amount of the tax and so stamped its invoices and bills as to indicate that of the amount charged to the customer 1/21 part was required by the sales tax in question. Thereafter the plaintiff computed and paid the excise tax upon [fol. 29] the basis of the price thus reduced, thereby saving to itself the payment of a tax upon a tax, 5 per cent on 5 per cent. The arrangement cost the customer nothing, as he paid in the aggregate just what he had paid before.

Consequently the plaintiff did not thereby pass the economic burden of the tax to its purchasers. However, since under this arrangement the invoices indicated the 1/21 of the amount billed was for the tax, I am constrained to conclude that the balance, 20/21, was the real sale price, especially since the tax was thereafter paid on that basis. This requires the conclusion of fact that in legal effect the tax was collected from the purchaser. But in view of the fact that the sales prices in vogue prior to the inauguration of this arrangement were thereafter reduced by the amount of the tax, I find further that in so far as the tax was collected from purchasers, it was wholly returned to them.

The issue which produced by far the greater part of the record was whether or not the chains, upon the sale of which the tax was laid, were "accessories for any of the articles enumerated" within the purview of Sec. 900 of the Revenue Act of 1921. This issue was framed principally by the allegations of paragraph 7 of the complaint that the chains in question were of a design, shape, size and dimensions exactly similar to those used for tires of tractors, fire engines and similar vehicles not within the purview of the Revenue Act, and that there was nothing in their design and construction to make them primarily adapted only for use on the taxable articles enumerated therein; that they [fol. 30] were not sold on or in connection with such taxable vehicles; that they were not accessories of such vehicles within the meaning of the Act, but were in fact commercial commodities interchangeable as to their use on both taxable and non-taxable vehicles, and were advertised and commonly sold and profitably used for such general purposes. These allegations were denied.

From the evidence I find that the chains in question were all sold by the plaintiff to jobbers and dealers, so that even the plaintiff did not know, and could not know, how many of the chains thus sold were eventually used or purchased for use on non-taxable vehicles; that said chains generally were advertised by the plaintiff for use on non-taxable vehicles as well as taxable ones; that said chains were manufactured in a multitude of sizes, varying not only in the length of the side or rim chain, but also in the length of the cross chain, and generally heavier wire was used throughout in construction of the larger sizes. Of this number, however, 49 sizes, which will be listed in Schedule "A," hereinafter referred to, fitted at least one type of

non-taxable vehicles equally as well as any taxable vehicle; that they operated as effectively upon the one class of vehicles as upon the other; that wholly without adaptation for the purpose they were interchangeable upon such vehicles of both classes as used tires of substantially the same size; that there was no differentiation either of construction or of design in the chains used on the tires of non-taxable vehicles from those used on tires of taxable vehicles; and [fol. 31] that in ordering chains, the universal practice was to order by size only, without specification of the purpose, i. e., whether for taxable or non-taxable vehicles.

If it be deemed of any importance, notwithstanding the views expressed in the following opinion, it may be noted as a part of the findings of fact that the mechanical design (i. e., the invention) of the plaintiff's chains was embodied in patents issued as early as 1904, and chains were in use for automobiles and trucks before the internal-combustion tractor came upon the market.

It may also be noted that the number of taxable vehicles during the taxable periods exceeded the number of non-taxable motor vehicles. If that fact was not fully established by competent evidence, at least it was conceded by the plaintiff on brief.

On the subordinate facts, I conclude that the chains listed in Schedule "A" were not primarily adapted for use on taxable vehicles, but were equally adapted for use on non-taxable vehicles.

Although, as stated, the plaintiff did not, and necessarily could not, prove by direct evidence that any particular chain found its way to the wheel of a non-taxable vehicle, yet from the evidence that the sizes listed in Schedule "A" were adapted for such use, and that it was common practice for all types of non-taxable vehicles generally to use such chains and, indeed, that the use of such chains was often required for the successful and efficient operation of such vehicles, I conclude that the sizes listed in Schedule "A" were actually used on non-taxable vehicles, and that such use was common, substantial and profitable—not exceptional or experimental only.

[fol. 32] The evidence does not, however, establish the fact that there were in existence during the taxable periods non-taxable vehicles which respectively have requirements calling for chain sizes other than those listed on Schedule "A." Accordingly, I find that all the chains sold, except

those listed on Schedule "A," were designed and primarily adapted for use on taxable vehicles, there being no evidence that they had any other use during such periods.

The list of sizes, 49 in number, for which a non-taxable use was shown, together with the amounts of taxes paid on all chains of each such size sold during each of the three taxable periods, are shown on Schedule "A," which may be attached hereto and shall constitute a part of the findings herein.

The facts bearing on the computation of interest, I find to be as follows: The tax on the sales of each month was paid by the plaintiff on or before the last day of the next succeeding month. The plaintiff by Exhibit 51 shows month by month the tax paid on all sizes, lumped together, of the chains sold during the taxable period. The evidence, however, contains nothing to show the month by month payment of the tax upon the numerous sizes of chains separately stated. Consequently, on the evidence, the only useful conclusion possible is that so much of the tax as was paid upon the sizes listed in Schedule "A" was in each case paid not later than the last day of the month following the taxable period in question.

The plaintiff, on trial and on brief, has contended that [fol. 33] some of the chains sold (49 in number according to my finding) have been shown to be commonly used on non-taxable vehicles and to be equally adapted to such use, and that since in fact the only difference between such chains and the others sold by the plaintiff is a difference of size only, it must be held that all chains so sold are not "accessories for any of the articles enumerated" as taxable vehicles within the meaning of the Act, and that therefore the tax upon the sale of all the chains in question was illegally assessed and collected.

The defendant on the other hand claims that the sales of all the plaintiff's chains were taxable and that the plaintiff has failed to establish the burden of proof to the contrary. I believe study of the basic law will disclose that both claims are too broad.

The statute under which the taxes in question were exacted and paid was Sec. 900 of the Revenue Act of 1921 (42 Stat. 291), which reads as follows:

"Sec. 900. That there shall be levied, assessed, collected and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to

the following percentages of the price for which so sold or leased:

"(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;

[fol. 34] "(2) Other automobiles and motorcycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof, except tractors, 5 per centum;

"(3) Tires, inner tubes, parts or accessories, for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum;" * * *

The Act itself thus enumerates automobile trucks, automobile wagons, other automobile and motorcycles as being vehicles subject to a sales tax (either of 3 per cent, or 5 per cent) and expressly exempts tractors from the tax.

In the case of American-LaFrance Fire Engines Co. v. Riordan, 6 Fed. (2nd) 964, it was held that fire engines and fire apparatus were not subject to the sales tax. This decision has never been overruled and must be deemed to be the law.

It will also be observed that regulations 47, Article 12, provides that self-propelling machines such as concrete mixers, stone crushers, etc., and machines which perform a mechanical function as they move along the highway, such as road graders and scrapers, sprinklers, etc., are not subject to tax.

Thus, by express provision of the Act, by judicial decision and by treasury regulations, certain types of automotive vehicles are held to be exempt from the excise tax. It is to such vehicles, of course, that I had reference when, in [fol. 35] the findings of fact above, I used the term "nontaxable vehicles," and for brevity I shall use the phrase in the same meaning throughout this opinion. Similarly the words "taxable vehicles" will be used to denote all vehicles subject to tax under this Act.

Pursuant to the authority contained in said Act, the Commissioner of Internal Revenue prescribed and promulgated Regulations No. 47 (Revised December, 1921)

for the enforcement of the Act. These Regulations provide as follows:

"Article 16

"Art. 16. Definition of Accessories.—An 'accessory' for an automobile truck, automobile wagon, or other automobile, or motorcycle is any article designed to be attached to or used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for use in connection with such vehicle, whether or not essential to its operation.

"The term 'accessories' includes, for example, automobile tops, back and side curtains, horns, speedometers, self-starters, spot lights, shock absorbers, tire pumps, pressure gauges, and hydrometers.

"Articles which have a general commercial use and which are not especially designed and peculiarly adapted for use in connection with automobile trucks, automobile wagons, other automobiles, or motor cycles are not subject to tax as 'parts' or 'accessories.' Thus a wrench or other tool [fol. 36] of a kind ordinarily sold in hardware stores for general purposes is not subject to tax when sold separately, but if incorporated in an automobile tool kit, designed, intended, advertised, or held out for use on an automobile as distinguished from garage or shop equipment, is taxable as part of the completed kit." * * *

"Robes, goggles, and lunch kits are not subject to tax. Asbestos brake-bank linings, generator tubing, and radiator hose are not subject to tax unless sold in prepared sizes, lengths, shapes, or with such fittings as make them adapted for use only on or in connection with automobiles.

"Parts or accessories for automobile trucks, automobile wagons, other automobiles, or motor-cycles primarily adapted for use on or in connection therewith when sold for any other purpose are not taxable provided the purchaser files with his order a statement that such parts or accessories are to be used on or in connection with another article of commerce not enumerated or included in subdivisions (1), (2), or (3) of Section 900. For example, a self-starter primarily adapted for use on an automobile, if sold to a manufacturer of motor boats, such manufacturer stating in his order that it is to be used in the manufacture of a motor boat and not upon an automobile, is not taxable."

At the outset it must be noted that the Act does not impose a tax upon accessories. Instead, the tax attaches only to the sales of "accessories for any of the articles enumer- [fol. 37] ated," i. e., taxable vehicles. The distinction is important because the word "accessories," considered for its inherent content, is broad enough to include all articles which have some use incidental to some other element or article. Thus, if accessories be deemed a class, membership in that class is determined not by the inherent characteristics of the article in question, but rather by its inherent relative capacity. Thus it is clear that if the word denotes a class, it is not a generic class, but rather a miscellaneous array of articles which come within the connotation of the word not because of any similarity to each other but solely because they have in common a certain capacity of association. To be sure, the word denotes objects of physical properties, but it would seem that everything in the wide domain of physics must come within the scope of the word provided always it has the capacity for association. Thus, in the case of Universal Battery Co. v. U. S., 281 U. S. 582, the court said:

"Taking the three subdivisions together it is apparent that the words 'parts' and 'accessories' have the same meaning in all; that they comprehend articles having some relation to the enumerated motor vehicles; and that it is because of that relation that the tax is laid on their sale." * * *

Consequently, if the Act defines a class of articles for purposes of taxation, the controlling definition must be found not in the word "accessories," but rather in its objective qualification "for any of the articles enumerated [fol. 38] in subdivision (1) or (2)," that is, in taxable motor vehicles. And so it is that the Court, in the case just referred to, said:

"Thus the scheme of taxation embodied in these provisions centers around the motor vehicles enumerated therein. Their sale is the principal thing that is taxed, and the sale of parts and accessories 'for' such vehicles is taxed because the parts and accessories are within the same field with the vehicles and used to the same ends."

It results that though one article be a large or small replica of another, it does not follow that both belong to the

class of accessories for taxable vehicles. Without any difference except of size, within the meaning of the Act one article might be an accessory, another not. Thus the plaintiff could not recover the tax on all chains sold merely by proof that the chains used on certain non-taxable vehicles were identical with those used on taxable vehicles, and except for sizes were identical with all the other chains sold. It sustained the burden of proof only in so far as it established an actual use on non-taxable vehicles for each size of chain. In other words, such sizes as were not shown to have an actual non-taxable use, were not non-taxable merely because identical except as to size with some generic class of chains. For, as we have seen, the Act does not impose the tax upon a generic class.

That a showing of a common use on non-taxable vehicles was an essential part of the plaintiff's case is indicated by [fol. 39] another expression of the Court in its opinion in the Universal Battery case, supra:

"Certainly it would be unreasonable to hold that articles equally adapted to a variety of uses and commonly put to such uses, one of which is use in motor vehicles, must be classified as parts or accessories for such vehicles. And it would be also unreasonable to hold that articles can be so classified only where they are adapted solely for use in motor vehicles and are exclusively so used."

To prove a use for a chain of any given size on non-taxable vehicles, it was indispensable for the plaintiff to show that a non-taxable vehicle existed calling for that specific size of chain. The existence of the use thus established, that it was a common use might be proved by circumstantial evidence. And all chains of sizes thus proved to have an actual and common use with non-taxable vehicles were thereby shown to be commodities other than accessories for taxable vehicles.

Thus the contention of each party is too broad in that it is predicated upon the proposition that the tax falls upon a generic class which must include all or none of the chains sold.

The defendant puts particular emphasis on that portion of Regulations 47, Article 16, which speaks of design and defines an accessory as an article "designed to be attached to or used in connection with such vehicle or article * * *".

It is argued that since the original patents of the chain in question were applied for and issued prior to the advent of non-taxable vehicles, it necessarily follows that the chains [fol. 40] were designed for taxable vehicles which alone were in existence when the chain was invented. The argument, I believe, involves a misconstruction of the word "design" as used in the Regulations. Clearly, the design of the manufacturer and seller—not that of the original inventor—is what the regulations intended.

Indeed, this contention on the part of the defendant, if generally applied, would lead to incongruous results. For example, if the argument is valid, a storage battery could not be taxable as an accessory because the basic patent for storage batteries proceeded the automobile industry. But in the Universal Battery case it was clearly held that storage batteries might be taxable.

Again, the defendant argues that the question of adaptability is one which can be established only by proof of duty requirements. As to this claim, it need only be said that the Act, the Regulations, and all the reported cases contain no basis for the contention. And it is well established that the question of mechanical adaptability may be shown by pragmatic evidence that the mechanism in question does in fact function. Here, there is an abundance of testimony that the identical chain used on an automobile functions equally well on a non-taxable vehicle. That the testimony is the product of actual experience as distinguished from mathematical computation does not vitiate its admissibility and, if anything, adds to its weight.

The defendant further claims that under the doctrine of "chief use", the plaintiff cannot recover. This is a doctrine developed in connection with the construction of the tariff [fol. 41] laws, to aid in determining the membership of imported goods in the generic classes of articles subjected to tax by the statute. Its teaching is that when a certain article, by reason of its physical characteristics, may be claimed to lie within either of two classifications, its chief use shall control; and its "chief use was to be ascertained by that which was commonly, practically, and generally done." Magone v. Wiederer, 15 U. S. 555.

This case of Magone v. Wiederer is cited in the Universal Battery case, not to indicate that the old customs doctrine

of chief use has application to the Revenue Act of 1921, but, I think, to indicate that even under the customs cases exclusive use within the field of a certain classification was not required to bring the article in question within the classification. Indeed, the greater part of the Magone opinion was devoted to this proposition.

It may, therefore, be doubted that the test of chief use has application to cases under Section 900. But were it otherwise, the defendant's claim could not be sustained. For a study of the Magone case, and especially of the Judge's charge, which was expressly approved in the opinion, shows clearly that the existence of "chief use" is negatived by proof that the articles in question "have several uses to which they are perfectly applicable." And so it is that here the plaintiff, by proving that numerous sizes of chains have "several uses" (i. e., use on tractors, fire apparatus, road equipment, etc.) to which they are equally adapted (*and hence perfectly applicable*"), has fully negatived any possible basis which the defendant might have for claiming the applicability of this doctrine.

[fol. 42] Obviously, the tax might have been more easily administered if the Act had provided that all chains should be taxable. But since the Act makes their taxability dependent upon their relation to taxable vehicles, the labor of ascertaining the existence or non-existence of that relation, in the first instance on the part of the taxpayer and Treasury Department, and ultimately on the courts, cannot be allowed to change the effect of the Act.

The defendant at the close of its case made a motion for judgment upon the grounds of a motion to dismiss which it had filed at an earlier stage in these proceedings. Judge Thomas, in an opinion on file, treated this motion under the Connecticut practice as raising only the question of jurisdiction and, finding a presence of proper jurisdiction in this court, denied the motion. By its pending motion, the defendant thus renews its claim that the Commissioner, by Section 424 of the Revenue Act of 1928, was given fact-finding jurisdiction to the exclusion of the courts. The motion coming at this time also fairly raises the question whether, if there be jurisdiction in the court to find the facts, the plaintiff by its evidence in this case has established facts necessary to bring it within the said section.

The text of the section is as follows:

"Revenue Act of 1928

"Sec. 424. Refund of Automobile Accessories Tax.—(a) No refund shall be made of any amount paid by or collected [fol. 43] from any manufacturer, producer, or importer in respect of the tax imposed by subdivision (3) of section 600 of the Revenue Act of 1924, or subdivision (3) of section 900 of the Revenue Act of 1921 or of the Revenue Act of 1918, unless either—

"(1) Pursuant to a judgment of a court in an action duly begun prior to April 30, 1928; or

"(2) It is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of an article subject to tax, or that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him; or

"(3) The Commissioner certifies to the proper disbursing officer that such manufacturer, producer, or importer has filed with the Commissioner, under regulations prescribed by the Commissioner with the approval of the Secretary, a bond in such sum and with such sureties as the Commissioner deems necessary, conditioned upon the immediate repayment to the United States of such portion of the amount refunded as is not distributed by such manufacturer, producer, or importer, within six months after the date of the payment of the refund, to the persons who purchased for purposes of consumption (whether from such manufacturer, producer, importer, or from any other per- [fol. 44] son) the articles in respect of which the refund is made, as evidenced by the affidavits (in such form and containing such statements as the Commissioner may prescribe) of such purchasers, and that such bond, in the case of a claim allowed after February 28, 1927, was filed before the allowance of the claim by the Commissioner.

"(b) The second proviso under the heading 'Internal Revenue' in section 1 of the First Deficiency Act, fiscal year 1928, and the second proviso of the fourth paragraph under the heading 'Internal Revenue Service' in section 1 of the Treasury and Post Office Appropriation Act for the fiscal year 1929, are repealed."

A study of the Act will disclose that this motion therefore raises in addition to the jurisdictional question already decided, substantially the same questions as those involved in the issue, outlined above, as to whether the plaintiff itself paid these taxes for which it now seeks recovery, or whether they were collected directly or indirectly from plaintiff's customers.

On the question of jurisdiction, it may be observed that since Judge Thomas gave his opinion on the defendant's motion, the Supreme Court of the United States has said in Graham & Foster v. Goodcell, 282 U. S. 409:

"It is not necessary to review this analysis, for there can be no doubt that these words do have approximate reference [fol. 45] to action in the course of administration. But it does not follow that by the use of these words the statute is limited to such action. There is no basis for the suggestion that there were questions involved of such a character as to make it appropriate to submit them to the exclusive judgment of the Commissioner. The question was not as to the merits of the tax but simply as to the existence of certain facts of time and procedure. These facts were matters of record, easily ascertained and definite in character. It would be anomalous that the right of the taxpayer to obtain a refund from the Department, to which he was under obligation to resort (R. S. 3226, U. S. A. Tit. 26, sec. 156), should be denied, while the right to recover by suit the same amount under exactly the same circumstances should remain unaffected. In the attempt to explain this anomaly, it is said that the provision was inserted because of a distrust of administrative refunds. But section 611 contains no exception as to judicial proceedings, and its prohibition is one which can be enforced appropriately by the courts when the taxpayer demands relief by suit. We are brought back to the fundamental purpose of the statute, and we are unable to conclude that it established one rule for the Department and another for the courts. We think that it was intended to prevent refunds in the circumstances stated and not merely a particular way of getting the money from the Treasury; that the effect of the provision was to deny a [fol. 46] right to recover the amount paid and that the provision governs equally wherever the right is asserted."

In the case just referred to, it was claimed that certain provisions of the Revenue Act of 1928 dealing with "credit

and refunds'' and ''overpayment'' had application only to proceedings before the Department and not to proceedings before the court. But the reasoning of the court in holding otherwise seems to require the denial of the defendant's claim here that the effect of section 424 was to establish one rule for the Department, ousting the courts of jurisdiction.

Nor, when it has been so long and so firmly established that a taxpayer, feeling aggrieved, by appropriate action at law may have his claim heard by a court of the United States, and thus obtain a judicial determination of the very facts upon which the validity of the original assessment depended, will it be lightly held that Congress intended to make the exercise of discretion on the part of the Commissioner final without other than a departmental review. Indeed, in the ''First Deficiency Act, fiscal year 1929,'' approved March 4, 1929 (45 Stat. 613), in a paragraph under the heading, ''Treasury Department, Bureau of Internal Revenue,'' Congress prescribed certain procedural limitations upon the power of the Department in respect to tax refunds, in all cases other than those in which ''a suit in court or a proceeding before the Board of Tax Appeals has been or shall be instituted or payments in cases determined upon precedents established in decisions of courts, or the [fol. 47] the Board of Tax Appeals.'' In so far as this legislation indicates a congressional intent that the Department should follow the guidance of the courts, it impliedly negatives a legislative intent to confer on the Commissioner to the exclusion of the courts the fact-finding duty imposed by Section 424. Electric Storage Battery Co. v. McCaughn, 52 Fed. (2nd) 205; Boyle Valve Co. v. U. S., 38 Fed. (2nd) 135.

Concluding then that this court has jurisdiction, and, indeed, the responsibility of determining all questions of fact involved in Section 424 of the Act of 1928, it becomes necessary to determine what was meant by that Act. It will be observed that this Act, in Paragraph (b) repeals the second proviso under the heading ''Internal Revenue'' in Section 1 of the First Deficiency Act, fiscal year 1928 (45 Stat. 30). The proviso thus repealed prohibited the refund of the automobile accessories tax unless a bond were filed by the manufacturer conditioned upon the repayment of the tax ''to the persons who purchased for the purposes of con-

sumption (whether from such manufacturer * * * or from any other person)." In short, it is substantially the same as the provisions of Section 424 (a) (3). Thus the proviso appeared to assume that all taxes on accessories had been and would be passed along by manufacturer and dealer to the ultimate consumer, who would necessarily be left to bear the ultimate economic burden of the tax. Obviously, the assumption was faulty and consequently it is not surprising that a few months later Congress should have repealed this proviso and substituted therefor Section 424 of the Revenue [fol. 48] Act of 1928. This section, it will be observed, in Paragraph (a) prohibits the refund of the accessory tax with three exceptions serially numbered. The first exception, clause (1), deals with actions begun prior to April 30, 1928, and consequently is not here involved. The third exception, clause (3), largely reenacts the provisions of the proviso which we have just discussed, and fully provides for that class of cases in which the tax has been passed along to the ultimate consumer and has not been refunded to him. What is new in the section is that portion contained in Paragraph (a) (2). Obviously the exception therein set forth is intended to take care of all proper cases for a refund not included in the other exceptions. And so we find the Act prohibiting refunds unless the amount of the tax "was not collected, directly or indirectly, from the purchaser" or unless it had in fact already been "returned to him." In such cases obviously there was no occasion for the requirement of the bond prescribed in exception (3).

The findings in these cases, it is true, indicate that, beginning at some time in 1923, the tax in legal effect was "collected" from the purchasers. But it is also found that they did not bear the economic burden of the tax because the manufacturer itself absorbed the burden by reducing the price of the commodity by the amount of the tax. It also results that, although collected from the purchaser, the tax had been "returned to him." For the legal effect is the same whether the refund to the purchaser is made after the tax is "collected" from him, or whether it is sooner made [fol. 49] in the form of a price reduction before it is "collected" at all.

That such a conclusion is in full accord with the legislative intent is fully apparent from the report of the Ways and Means Committee with reference to this section, the

text of which is set forth in the opinion in Boyle Valve Co. v. U. S., supra. The report clearly indicates an intent to allow the refund without bond to taxpayers otherwise entitled thereto who "did not pass the tax on."

If, however, the construction indicated were deemed inadmissible and if, further, the provisions of (a) (2) of the section, separately considered, were construed to apply to the legal effect rather than the economics of the factual situation, the meaning of the several paragraphs of the section, when considered in relation to each other and in the light of its history, becomes doubtful. The ambiguity thus arising fully justifies us in looking beyond the words of the Act to ascertain the legislative intent. Finding in the report of the Committee referred to a manifest intent to prohibit refunds only to those who have not borne the burden of the tax, thereby preventing unjust enrichment of the manufacturer at the expense of the consumer, a proper regard for the rules of statutory construction requires us to give effect to the true legislative intent. Holy Trinity Church v. U. S., 143 U. S. 457; Danovitz v. U. S., 281 U. S. 389; American LaFrance Fire Engine Co. v. Riordan, supra. Accordingly, I hold that the plaintiff here, who has borne the burden of the tax, is not by this section precluded from recovery.

[fol. 50] The construction which I have indicated, it may be observed, follows that adopted in the case of Boyle Valve Co. v. U. S. rather than that suggested in the Electric Storage Battery Co. v. McCaughn, which, as I understand it, would require a finding by the Commissioner as to the facts involved in the section even after a final judgment by a court of competent jurisdiction. Such a construction would seem to be at variance with the underlying principles upon which the case of Graham & Foster v. Goodcell was decided.

It thus results that the defendant's motion claiming both a lack of jurisdiction and a lack of evidence to sustain the plaintiff's burden of proof on the factual requirements of Section 424 must be denied on both grounds, and the issue of fact involved must be resolved in favor of the plaintiff.

In any event, it should be noted that the burden of proof as to this issue was fully sustained by the plaintiff as to case No. 3371, dealing with a taxable period in 1922. It was not until in the midst of the ensuing period that the

plaintiff adopted the practice which necessitated the foregoing discussion as to the factual requirements (distinguished from the jurisdictional implications of Section 424.

It results that the plaintiff is entitled to judgment as follows: In case No. 3371, in the amount of $172,470.36 with interest from January 31, 1923; in case No. 3360, in the amount of $329,250.00 with interest from January 31, 1924; and in case No. 3421, in the amount of $98,416.41 with inter-
[fol. 51] est from July 31, 1924. Costs in each case to the plaintiff.

Ordered Accordingly.

Carroll C. Hincks, U. S. D. J.

March 5, 1932.

SCHEDULE "A"

Tax on Total Sales of Sizes Listed from July 1 to December 31, 1922

(Extracted from Plaintiff's Exhibit No. 52)

Sizes	Tax paid
30 x 3 ½	$66,227.15
30 x 3	11.04
32 x 4 ½	10,845.08
32 x 4	16,792.36
33 x 5	4,594.47
33 x 4	17,234.99
34 x 4 ½	11,318.06
34 x 5	1,029.57
35 x 5	8,690.77
35 x 4 ½	1,420.79
36 x 6	1,921.24
36 x 5	1,481.16
36 x 4	211.91
36 x 8	252.69
36 x 4 ½	619.48
36 x 3 ½	69.93
[fol. 52] 36 x 7	255.71
36 x 10	41.70
38 x 7	619.05
38 x 4	10.75
38 x 8	19.28

Sizes	Tax paid
38 x 3 ½	.00
38 x 6	4.89
40 x 8	890.40
40 x 5	246.07
40 x 6	180.45
40 x 10	.00
40 x 7	105.46
42 x 9	108.86
31 x 4	10,276.01
33 x 4 ½	8,141.47
34 x 6	.00
34 x 4	8,603.17
30 x 8	.00
35 x 4	180.58
38 x 10	.00
36 x 9	.00
36 x 12	.00
40 x 12	.00
40 x 3 ½	.00
40 x 9	5.00
42 x 5	.00
44 x 10	53.03
46 x 7	.00
48 x 8	.00
48 x 6	.00
60 x 4	.00
60 x 3 ½	.00
20 x 3 ½	7.79
	$172,470.36

[fol. 53] Tax on Total Sales of Sizes Listed from January 1 to December 31, 1923

(Extracted from Plaintiff's Exhibit No. 52)

Sizes	Tax paid
30 x 3 ½	$138,041.95
30 x 3	8.25
32 x 4 ½	25,538.71
32 x 4	37,703.45
33 x 5	10,177.09
33 x 4	24,282.05

Sizes	Tax paid
34 x 4 ½	16,583.63
34 x 5	1,862.09
35 x 5	13,294.16
35 x 4 ½	2,644.45
36 x 6	3,969.33
36 x 5	1,620.71
36 x 4	274.68
36 x 8	985.46
36 x 4 ½	607.36
36 x 3 ½	50.06
36 x 7	660.28
36 x 10	186.42
38 x 7	1,268.13
38 x 4	5.71
38 x 8	16.65
38 x 3 ½	.49
38 x 6	77.63
40 x 8	2,092.60
40 x 5	413.55
40 x 6	287.73
40 x 10	256.39
40 x 7	148.47
42 x 9	247.26
31 x 4	19,552.85
[fol. 54] 33 x 4 ½	16,191.03
34 x 6	113.74
34 x 4	9,531.24
30 x 8	.00
35 x 4	158.43
38 x 10	.00
36 x 9	58.07
36 x 12	41.90
40 x 12	193.83
40 x 3 ½	.00
40 x 9	9.24
42 x 5	.00
44 x 10	94.93
46 x 7	.00
48 x 8	.00
48 x 6	.00
60 x 4	.00

Sizes	Tax paid
60 x 3 ½	.00
20 x 3 ½	.00
	$329,250.00

Tax on Total Sales of Sizes Listed from January 1 to June 30, 1924

(Extracted from Plaintiff's Exhibit No. 52)

Sizes	Tax paid
30 x 3 ½	$52,804.76
30 x 3	.73
32 x 4 ½	7,954.42
32 x 4	10,705.24
33 x 5	2,371.65
[fol. 55] 33 x 4	4,783.29
34 x 4 ½	3,394.77
34 x 5	370.63
35 x 5	2,794.72
35 x 4 ½	266.44
36 x 6	1,411.59
36 x 5	400.07
36 x 4	88.63
36 x 8	204.41
36 x 4 ½	69.35
36 x 3 ½	8.17
36 x 7	228.03
36 x 10	36.28
38 x 7	354.48
38 x 4	14.46
38 x 8	3.13
38 x 5 ½	.23
38 x 6	25.39
40 x 8	643.84
40 x 5	338.40
40 x 6	36.95
40 x 10	50.16
40 x 7	48.78
42 x 9	49.16
31 x 4	4,283.95
33 x 4 ½	2,826.74

Sizes	Tax paid
34 x 6	35.19
34 x 4	1,717.50
30 x 8	.00
35 x 4	11.92
38 x 10	.00
36 x 9	5.17
36 x 12	18.21
40 x 12	34.81
[fol. 56] 40 x 3 ½	.38
40 x 9	.00
42 x 5	.00
44 x 10	21.58
46 x 7	.00
48 x 8	.00
48 x 6	.00
60 x 4	.00
60 x 3 ½	.00
20 x 3 ½	2.80
	$98,416.41

IN UNITED STATES DISTRICT COURT

No. 3360

[Title omitted]

DEFENDANT'S REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

The defendant requests the Court to find from the evidence adduced at the trial of this case, each of the following findings of fact.

[fol. 57] 1. The use to which tire chains, such as those involved in this case, are placed determines the design of such chains or chain grips.

2. Plaintiff has failed to show the specific design of tire chain required for each of the uses to which its chains or chain grips were actually used or placed during the taxable periods involved.

3. Plaintiff has failed to show the specific duty requirements of each of the uses to which its tire chains were used or placed during the taxable periods involved.

4. Plaintiff has failed to show the specific design of tire chain required for each of the uses, other than on the tires of automobile trucks, automobile wagons, other automobiles, etc., to which its tire chains were placed or used during the taxable periods involved.

5. Plaintiff has failed to show the specific duty requirements of each of the uses, other than on the tires of automobile trucks, automobile wagons, other automobiles, etc., to which its tire chains were used or placed during the taxable periods involved.

6. Plaintiff has failed to show the specific design of tire chains required for each of the uses, other than on the tires of automobile trucks, automobile wagons, other automobiles, etc., to which its tire chains were placed, or used dur-
[fol. 58] ing the prior years, were of the same design as is required for use on automobile trucks, automobile wagons and other automobiles, etc., during the taxable periods involved.

7. Plaintiff has failed to show the specific duty requirements of each of the uses, other than on the tires of automobile trucks, automobile wagons, other automobiles, etc., to which its tire chains were placed or used during the prior years, were the same as the duty requirements of automobile trucks, automobile wagons, other automobiles, etc., uses, during the taxable periods involved.

8. Plaintiff has failed to show the specific number of each size and type of the tire chains manufactured and sold by it for each use to which its tire chains were placed or used during the taxable periods involved, other than on the tires of automobile trucks, automobile wagons, other automobiles, etc.

9. Plaintiff has failed to show the specific number of each size and type of tire chains manufactured and sold by it, upon the sale of which the taxes in question were imposed, which it manufactured and sold for other uses than on the tires of automobile trucks, automobile wagons, other automobiles, etc., during the taxable periods involved.

10. Plaintiff has failed to show that each specific size and type of tire chains, upon the sale of which the tax was [fol. 59] imposed for the taxable periods involved, were not designed for use on the tires of automobile trucks, automobile wagons, other automobiles, etc.

11. Plaintiff has failed to show that each specific size and type of its tire chains, upon the sale of which the tax was imposed for the taxable periods involved, were not primarily adapted for use on the tires of automobile trucks, automobile wagons, other automobiles, etc.

12. Plaintiff advertised to its trade and the public, in bulletins, catalogues, price lists, etc., put out by it during the taxable periods involved, that each of the specific sizes and types of its tire chains, upon the sale of which the tax in question was imposed for the taxable periods involved, were adapted for use on the tires of each make of practically all makes of automobile trucks, automobile wagons, other automobiles, etc., in use.

13. The chief or principal use to which tire chains, such as involved in this case, of the specific sizes and types upon the sale of which the tax in question was imposed for the taxable periods involved, was on the tires of automobile trucks, automobile wagons, other automobiles, etc.

14. All of the tire chains or chain grips manufactured and sold by plaintiff, upon which the tax in question was imposed for the taxable periods involved, were designed for use on the tires of some make of automobile truck, automobile wagon, other automobile, etc.

[fol. 60] 15. All of the tire chains or chain grips manufactured and sold by plaintiff, upon the sale of which the tax in question was imposed for the taxable periods involved, were primarily adapted for use on the tires of some make of automobile truck, automobile wagon, other automobile, etc.

16. The tire chains or chain grips, upon the sale of which the tax in question was imposed for the taxable periods involved, were manufactured and sold by plaintiff to its jobbers and distributors and plaintiff has no knowledge of the use to which such chains or chain grips were actually placed or used when sold by such distributors and jobbers.

17. No tire chains, upon the manufacture and sale of which the tax in question was imposed for the taxable periods involved, were sold by plaintiff direct to Federal, State or municipal governmental agencies or any territorial subdivisions thereof, during the taxable periods involved.

18. Plaintiff manufactured and sold tire chains during the taxable periods of the same design as that contained in the "Weed Patent" introduced in evidence as Defendant's Exhibit "A", which were adaptable for use on automobile-as set forth in the printed matter contained in such design.

19. Plaintiff during the taxable periods did not manufacture and sell "Weed Chains" especially designed for use on fire apparatus, excavating shovels, ditch diggers, grad-
[fol. 61] ers, road scrapers, street sweepers, street sprinklers, and tractors.

20. That tire chains similar to those involved were manufactured, sold, and used on automobiles prior to the advent of the internal combustion tractor.

21. That tire chains similar to those involved were manufactured, sold and used on automobile trucks, prior to the advent of the internal combustion tractor.

22. The tire chains or chain grips in use on the automobile truck prior to the advent of the tractor were upon the advent of the tractor, sold for use on tractors.

Defendant's Request for Conclusions of Law.

The defendant requests the Court to make each of the following conclusions of law:

1. The tire chains manufactured and sold by plaintiff during the taxable periods involved, upon the sale of which the tax in question was imposed, were manufactured and sold as parts or accessories of an automobile truck, automobile wagon, other automobile, etc., within the meaning of the provisions of Sections 900 (3) of the Revenue Act of 1921 and 600.(3) of the Revenue Act of 1924.

[fol. 62] 2. The tire chains manufactured and sold by plaintiff during the taxable periods involved, upon the sale of which the tax in question was imposed, were designed for use on automobile trucks, automobile wagons, other automobiles, etc.

3. The tire chains manufactured and sold by plaintiff during the taxable periods involved, upon the sale of which the tax in question was imposed, were primarily adapted for use on the tires of automobile trucks, automobile wagons, other automobiles, etc.

4. The plaintiff has failed to sustain the burden of proof placed on it in this action in that it has failed to establish the illegality of the tax.

5. The provisions of Section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of refund in this action for recovery of manufacturer's excise tax paid or collected under the provisions of Section 900 (3) of the Revenue Act of 1921.

6. The provisions of Section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of instituting and maintaining this action, for the recovery of manufacturer's excise tax paid or collected under the provisions of Section 900 (3) of the Revenue Act of 1921, subsequent to May 29, 1928.

7. The provisions of Section 424 of the Revenue Act of 1928 vest certain specific discretionary powers in the Commissioner of Internal Revenue which this Court is without [fol. 63] jurisdiction to determine or review.

8. The provisions of Section 424 (a) (1) of the Revenue Act of 1928 limit the jurisdiction of this court, to hear and determine the issues in an action for the recovery of manufacturer's excise taxes paid or collected under the provisions of Section 900 (3) of the Revenue Act of 1921, to actions instituted prior to April 30, 1928.

9. The provisions of Section 424 of the Revenue Act of 1928 provide a remedy for the recovery of manufacturer's excise tax paid or collected under the provisions of Section 900 (3) of the Revenue Act of 1921, which is exclusive of all other remedy.

10. The provisions of Section 424 of the Revenue Act of 1928 preclude recovery in this action of manufacturer's excise tax paid or collected under the provisions of Section 900 (3) of the Revenue Act of 1921, regardless of the nontaxable claims of the plaintiff.

11. Defendant is entitled to judgment against the plaintiff and in favor of the defendant, dismissing plaintiff's petition at plaintiff's costs.

John Buckley, United States Attorney.

[fol. 64] IN UNITED STATES DISTRICT COURT, DISTRICT OF CONNECTICUT

Law. No. 3360

AMERICAN CHAIN COMPANY, INCORPORATED, Plaintiff,

v.

ROBERT O. EATON, Collector of Internal Revenue for the District of Connecticut, Defendant

JUDGMENT

The above entitled action, having been commenced by Writ, Summons and Complaint dated July 3, 1929, returnable to this court on the first Monday of September, 1929, the defendant's motion to dismiss having been denied, and Amendment to the Complaint, Answer and Reply having been filed—all as appears on file—was at a stated term of this court, held in and for the District of Connecticut at the Post Office Building in New Haven in said District on the 20th day of October, 1931, brought on for trial and tried before the Honorable Carroll C. Hincks, District Judge, pursuant to a stipulation of the parties in writing waiving a jury under Section 773 of Title 28 of the United States Code, and the court having heard the testimony of the parties and considered the briefs of counsel, rendered its decision on March 5, 1932, finding the issues for the plaintiff, and directing that judgment be entered for the plaintiff in [fol. 65] the amount of $329,250.00, with interest thereon from January 31, 1924,

Now, on motion of David S. Day, Attorney for the plaintiff, it is

Ordered, adjudged and decreed,

That the plaintiff recover of the defendant the sum of $329,250.00 with interest thereon from January 31, 1924,

according to law, and its costs taxed at $27.00.

Dated at New Haven, Connecticut, this 14 day of April, 1932.

Carroll C. Hincks, U. S. District Judge.

Approved as to form.

George H. Cohen, Assistant United States Attorney.

E. F. M. David S. Day, Attorney for Plaintiff.

[fol. 66] IN UNITED STATES DISTRICT COURT

Law. No. 3360

[Title omitted]

CERTIFICATE OF PROBABLE CAUSE TO PREVENT EXECUTION AGAINST THE DEFENDANT

I, Carroll C. Hincks, District Judge of the United States and sitting in the District Court of the United States for the District of Connecticut, on the 14 day of April, 1932, do hereby certify as follows:

1. The above entitled action was commenced on the 3rd day of July, 1929, seeking the recovery of taxes paid by the plaintiff to the defendant. The taxes sought to be recovered amount to $352,111.51, with interest, and comprise manufacturer's excise tax under Title 9, Section 900, Subdivision 3 of the Act of Congress of the United States entitled Revenue Act of 1921, exacted by the defendant from the plaintiff for the year 1923, and paid by the plaintiff to the defendant, and by him paid into the Treasury of the United States. Upon the trial of said action, judgment was [fol. 67] on the 14 day of April, 1932, entered in favor of the plaintiff and against the defendant for the recovery of $329,250.00, and interest thereon from January 31, 1924, with costs taxed at $27.00.

2. The acts done by the said defendant in exacting and collecting the said tax as above set forth, and paying the same into the Treasury of the United States, were done in the performance of his official duties acting under the direction of the Secretary of the Treasury, or other proper officer of the United States Government, and the defend-

ant had probable cause for his acts, notwithstanding the fact that a part of said tax was erroneously collected and judgment has been rendered for a recovery thereof in said action as above set forth.

Carroll C. Hincks, United States District Judge.

Approved as to form:

George H. Cohen, Assistant United States Attorney.
Davis S. Day, Attorney for Plaintiff.

[fol. 68] IN UNITED STATES DISTRICT COURT

Law. No. 3360

[Title omitted]

ORDER ON FINDINGS AND CONCLUSIONS

Upon application of the United States Attorney for the District of Connecticut, it is hereby ordered, adjudged and decreed that the Findings of Fact and Conclusions of Law made by the Court and set forth in the order entered herein on March 5, 1932, for the purposes of and on appeal shall constitute Special Findings of Fact and Conclusions of Law.

Dated at New Haven, Connecticut, this 29th day of April, 1932.

Carroll C. Hincks, United States District Judge.

[fol. 69] IN UNITED STATES DISTRICT COURT

Law. No. 3360

[Title omitted]

ORDER EXTENDING TIME FOR FILING BILL OF EXCEPTIONS

The time for filing the Bill of Exceptions in this case, if an appeal is authorized to be taken on behalf of the Collector of Internal Revenue, is hereby extended to cover a period of three months from April 14th, 1932.

Dated at New Haven, Connecticut, this 25th day of April, 1932.

Carroll C. Hincks, United States District Judge.

[fol. 70] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

At Law. No. 3371

AMERICAN CHAIN COMPANY, INC., 929 Connecticut Avenue, Bridgeport, Connecticut, Plaintiff,

v.

ROBERT O. EATON, Collector of Internal Revenue of the United States of America for the District of Connecticut, Hartford, Connecticut, Defendant

COMPLAINT

UNITED STATES OF AMERICA,

District of Connecticut, *ss:*

The President of the United States of America to the Marshal of the District of Connecticut, Greeting:

You are hereby commanded to summon Robert O. Eaton, the Collector of Internal Revenue for the District of Connecticut, of North Haven in the State and District of Connecticut, defendant herein, to appear before the District Court of the United States for the District of Connecticut on the 1st Monday of October, 1929, then and there to answer unto American Chain Company, Inc., a corporation under the laws of the State of New York, and having its principal office and place of business in Bridgeport in [fol. 71] the County of Fairfield and State of Connecticut, plaintiff herein, in a civil action wherein the plaintiff complains and says:

1. That the plaintiff, at all times hereinafter mentioned, was and now is a corporation duly organized and existing under and by virtue of the laws of the State of New York, and having its principal office and place of business in said City of Bridgeport in the State of Connecticut, and within

the United States Internal Revenue District of the State of Connecticut, and brings this action in its own right.

2. That the defendant is a citizen of the United States and a resident of said North Haven, County of New Haven, State of Connecticut, and was at all the times mentioned herein and now is a duly appointed, qualified and acting Collector of Internal Revenue of the United States of America for the District of Connecticut, in which District the City of Bridgeport is located.

3. That the plaintiff is and was at all times mentioned herein engaged in the manufacture and sale of tire chain grips, together with other commodities, and that said grips are and were sold for, and used on, solid and pneumatic tires of automotive vehicles, such as tractors, fire engines and equipment, snow plows, street sweepers, oilers, graders, etc. That said grips were manufactured to fit the tires of automotive vehicles whether of tractors, fire engines, and vehicles not subject to the excise tax, or automobiles and trucks subject to tax within the purview of subdivision (3), Section 900 of Title IX, of the Revenue Act of 1921. That during the year 1922 it sold to its customers said tire chain grips having a general commercial [fol. 72] use other than on the tires of automobiles, trucks, and automobile wagons and paid tax thereon at 5% as and in the amount herein alleged.

4. That an excise tax at the rate of 5% under Title IX, Section 900, subdivision (3) of the Act of Congress of the United States, entitled "Revenue Act of 1921," was assessed against the plaintiff on sales of said tire chain grips and paid by it to the defendant as Collector of Internal Revenue of the United States of America, aggregating the sum of One hundred eighty-three thousand, three hundred sixty-five Dollars and forty-nine Cents ($183,365.49); that said payments made by plaintiff to defendant as its manufacturer's excise tax on the sales of tire chain grips made by it during the year 1922, were supposed by plaintiff to be due and payable to the United States of America and to said defendant as Collector of Internal Revenue, as demanded of plaintiff under and by virtue of said subdivision (3) of Section 900 of Title IX of said Revenue Act of 1921; that the following is a schedule showing the amounts of payments made by plaintiff as above set forth, the months

for which payments were made, and the dates on which the same were made:

1922	Amount of tax claimed as refunded	Date of payment
July	$8,205.73	Aug. 31, 1922
Aug.	16,981.38	Sept. 30, 1922
Sept.	28,821.01	Oct. 31, 1922
Oct.	30,528.43	Nov. 30, 1922
Nov.	40,555.84	Dec. 31, 1922
Dec.	58,273.10	Jan. 31, 1923
	$183,365.49	

[fol. 73] 5. That said tax represents 5% of the invoice price of all tire chain grips sold by the plaintiff from July 1 to December 31, 1922, inclusive; that said tax was not paid either directly or indirectly by the purchaser of said grips, but was paid entirely by the plaintiff and said grips were sold to the customers of plaintiff at a flat price and no amount for excise tax was included therein; that plaintiff did not increase the price of said chain grips by the amount of the excise tax, but absorbed said amount of tax without passing it on to the purchasers.

6. That on or about the 30th day of August, 1926, the plaintiff filed with the defendant its claim for refund of the amount of $183,365.49 so paid to the defendant as Collector of Internal Revenue and more particularly set forth in the above schedule of payments. That on or about the 23rd day of August, 1927, the Commissioner of Internal Revenue by notice to plaintiff rejected in full said claim for refund and refused to refund to plaintiff the said sum; that the defendant and the Commissioner of Internal Revenue have at all times since said date refused to refund to plaintiff the amount of said payments made by plaintiff to defendant as above set forth.

7. That said tire chain grips sold and used for the tires of automotive vehicles are of a design, shape, size and of dimensions exactly similar to chain grips used for the tires of tractors, fire engines and equipment, and similar vehicles [fol. 74] not subject to tax within the purview of subdivision (3), Section 900, of Title IX of the Revenue Act of 1921. That tire chain grips of exactly the same type

and specifications as those sold by plaintiff and tax paid during said period can be and are now commonly and profitably used upon both taxable and non-taxable automotive vehicles; that there is nothing in the design and construction of said grips sold by plaintiff as herein alleged to make them primarily adapted only for use on tires of automobiles, trucks or automobile wagons and that said grips may be and are used for other purposes and especially for the tires of tractors, fire engines and similar equipment; that the Commissioner of Internal Revenue has found as freely admitted to plaintiff that a substantial number of said tire chain grips were sold and used upon vehicles not subject to said tax but said Commissioner refuses to make refund of the tax paid as herein alleged on said grips so sold for the reason that the exact amount of sales therefor is not ascertainable; that said chain grips sold by plaintiff during said period were not sold or in connection with automobile trucks, automobile wagons, automobiles, and/or motorcycles, or in connection with the sale thereof; that said tire chain grips were not parts or accessories for automobile trucks, automobile wagons, other automobiles and/or motorcycles within the intent and meaning of Section 900, Title IX of the Revenue Act of 1921 or any subdivision thereof, but were in fact commercial commodities interchangeable as to use on both taxable and non-taxable vehicles, were so advertised and were commonly sold for such general purposes.

[fol. 75] Wherefore plaintiff prays judgment against the defendant in the amount of One hundred eighty-three thousand three hundred sixty-five Dollars and forty-nine Cents ($183,365.49), with interest as follows:

On $8,205.73, from Aug. 31, 1922.
On $16,981.38, from Sept. 30, 1922.
On $28,821.01, from Oct. 31, 1922.
On $30,528.43, from Nov. 30, 1922.
On $40,555.84, from Dec. 31, 1922.
On $58,273.10, from Jan. 31, 1923.

Philo C. Calhoun of Fairfield is recognized in the sum of $150.00 to prosecute, etc.

Hereof fail not, but of this writ, due service and return make.

Witness the Honorable Edwin S. Thomas, Judge of the District Court of the United States, for the District of Connecticut, and the seal of said Court, at New Haven in said District, the 17th day of August, A. D., 1929.

Know all men by these presents, that the undersigned, American Chain Company, Inc., a corporation under the laws of the State of New York and located at Bridgeport in the State of Connecticut, as principal, and Philo C. Calhoun of Fairfield in said State of Connecticut as surety, acknowledge themselves jointly and severally bound to Robert O. Eaton, Collector of Internal Revenue for the United States of America for the District of Connecticut, in a recognizance of One hundred fifty Dollars ($150) that the said American Chain Company, Inc., shall prosecute [fol. 76] the action which it has now commenced against the said Robert O. Eaton, Collector of Internal Revenue for the United States of America for the District of Connecticut, returnable on the first Monday of October, 1929, to the United States District Court for the District of Connecticut, to full effect, and that said American Chain Company, Inc., will pay any costs for which judgment may be rendered against it in said action.

Dated at Bridgeport, Connecticut, this 16th day of August, 1929.

American Chain Company, Inc., by A. M. Marsh, Its Attorney. Philo C. Calhoun.

A true copy. Attest:

C. E. Pickett, Clerk.

C. E. Pickett, Clerk of the District Court of the United States for the District of Connecticut.

David S. Day, Attorney for Plaintiff. Office and Post Office Address: 886 Main Street, Bridgeport, Connecticut. Long, Chamberlain and Nyce, of Counsel, Washington, D. C.

[fol. 77] NOTE RE MOTION TO DISMISS

No. 3371. Law

(The Motion to Dismiss in this case is exactly like the Motion to Dismiss in No. 3360 Law.)

IN UNITED STATES DISTRICT COURT

No. 3371. Law

[Title omitted]

ORDER OVERRULING DEFENDANT'S MOTION TO DISMISS

This action, by writ of complaint claiming $183,365.49 damages, came to this court on the first Monday of October, 1929 and thence to the present time, when the parties appeared and were at issue on the defendant's motion to dismiss as on file.

The court, having heard the parties, finds the issues for the plaintiff, and orders that the defendant's motion to dismiss be denied.

Dated at New Haven this 1st day of June, 1931.

Edwin I. Thomas.

[fol. 78] IN UNITED STATES DISTRICT COURT

No. 3371. Law

[Title omitted]

ANSWER

Paragraph one of plaintiff's petition is admitted except defendant denies plaintiff brings this action in its own right.

Paragraph two of plaintiff's petition is admitted.

With respect to paragraph three of plaintiff's petition, defendant admits and alleges that plaintiff is and was at all times mentioned herein engaged in the manufacture and sale of chain grips and that said grips are and were primarily designed, manufactured, advertised, sold for and used on solid and pneumatic tires of automotive vehicles such as automobile trucks, automobile wagons, other automobiles and motorcycles, but defendant denies such chain grips were sold for and used on tractors, fire engines and equipment, snow plows, street sweepers, oilers, graders, etc. Further answering paragraph three defendant admits and alleges that said chain grips were designed, manufactured, advertised, and sold to fit the tires of automotive vehicles such

as automobile trucks, automobile wagons, other automobiles, and motorcycles as parts or accessories thereof with- [fol. 79] in the purview of Section 900 of the Revenue Act of 1921, but defendant denies that such grips were designed, manufactured and sold for use on tractors, fire engines and vehicles not subject to excise tax. Further answering paragraph three defendant admits and alleges that during the year 1923 plaintiff sold to its customers namely, jobbers and distributors, said chain grips primarily designed, manufactured, and advertised for use on automobile trucks, automobile wagons, other automobiles and motorcycles and that plaintiff paid tax thereon at the rate of 5% in the amount of $183,365.49, but defendant specially denies that said chain grips have or had a general commercial use and defendant specially denies said chain grips were sold for use or used on other than the tires of automobile trucks, automobile wagons, other automobiles, and motorcycles.

Paragraph four of plaintiff's petition is admitted.

Defendant denies the averments of paragraph five of plaintiff's petition and alleges that the tax in question represents the amount shown on the manufacturer's excise tax returns filed by and assessed against plaintiff for each of the taxable periods involved.

Paragraph six of plaintiff's petition is admitted.

Defendant denies the averments of paragraph seven of plaintiff's petition and alleges that the chain grips manufactured and sold by plaintiff during the taxable periods in question, upon the sale of which the tax in question was imposed, were primarily designed, manufactured, advertised, and sold for use on or in connection with automobile [fol. 80] trucks, automobile wagons, other automobiles, and motorcycles as parts or accessories thereof within the meaning of the provisions of Section 900 of the Revenue Act of 1921.

—— ——, Defendant, by John Buckley, United States Attorney; George H. Cohen, Assistant United States Attorney, His Attorneys.

IN UNITED STATES DISTRICT COURT

No. 3371. Law

[Title omitted]

PLAINTIFF'S REPLY

The plaintiff denies the allegations contained in the defendant's answer.

—— ——, Plaintiff, by Marsh, Stoddard & Day, Its Attorneys.

[fol. 81] NOTE RE STIPULATION WAIVING TRIAL BY JURY

No. 3371. Law

(The Stipulation Waiving Trial by Jury in this case is exactly like the Stipulation Waiving Trial by Jury in No. 3360 Law.)

NOTE RE DEFENDANT'S REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

No. 3371. Law

The Defendant's Request for Findings of Fact and Conclusions of Law in this case is exactly like the Defendant's Request for Findings of Fact and Conclusions of Law in No. 3360 Law.

IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR JUDGMENT

The defendant herein respectfully moves this court for judgment in favor of the defendant and against the plaintiff, for the following reasons:

[fol. 82] 1. Plaintiff has failed to show by the evidence the particular sales upon which it paid excise taxes, for the taxable periods July, 1922, to December, 1922, inclusive.

2. Plaintiff has failed to show by the evidence the particular sizes, types and weights of "Weed Chains" upon the sales of which excise taxes were imposed for the taxable periods July, 1922, to December, 1922, inclusive.

3. Plaintiff has failed to show by the evidence the numbers of "Weed Chains" sold by plaintiff to the consumer for use on other than automobile trucks, automobile wagons, or other automobiles during the taxable periods July, 1922, to December, 1922, inclusive.

4. Plaintiff has failed to show by the evidence the amount of tax paid on sales of "Weed Chains" by the plaintiff to the consumer for use on other than automobile trucks, automobile wagons, or other automobiles for the taxable periods July, 1922, to December, 1922, inclusive.

5. Plaintiff has failed to show by the evidence the number, sizes, types and weights of "Weed Chains" sold by plaintiff to the consumer for use on other than automobile trucks, automobile wagons, or other automobiles during the taxable periods July, 1922, to December, 1922, inclusive.

6. Plaintiff has failed to show by the evidence the "Weed Chains" manufactured and sold by it during the taxable periods, July, 1922, to December, 1922, inclusive, were not [fol. 83] designed to be attached to or used in connection with automobile trucks, automobile wagons or other automobiles to add to their utility or ornamentation.

7. Plaintiff has failed to show by the evidence the "Weed Chains" manufactured and sold by it during the taxable periods July, 1922, to December, 1922, inclusive, were not primarily adapted for use in connection with automobile trucks, automobile wagons, or other automobiles, whether or not essential to the operation or use of such vehicles.

8. Plaintiff has failed to sustain the burden of proof placed upon it in this action.

9. Plaintiff has failed to show by the evidence it has fully complied with the provisions of the Revenue Act of 1921 and Regulations 47 of the Treasury Department promulgated thereunder in that it has failed to avail itself of the exemption provisions of such Act and Articles 15 and 16 of such Regulations.

10. The evidence conclusively shows the "Weed Chains," manufactured and sold by plaintiff, during the taxable periods, July, 1922, to December, 1922, inclusive, the sale of which were taxed, were designed to be attached to or used in connection with automobile trucks, automobile wagons, or other automobiles, to add to their utility or ornamentation.

11. The evidence conclusively shows the "Weed Chains", manufactured and sold by plaintiff, during the taxable periods, July, 1922, to December, 1922, inclusive, were pri-
[fol. 84] marily adapted for use in connection with automobile trucks, automobile wagons, or other automobiles, whether or not essential to the operation or use of such vehicles.

12. The provisions of Section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of refund in this action of manufacturer's excise tax paid or collected under the provisions of Section 900(3) of the Revenue Act of 1921.

13. The provisions of Section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of instituting and maintaining this acton, for the recovery of manufacturer's excise tax paid or collected under the provisions of Section 900(3) of the Revenue Act of 1921, subsequent to May 29, 1928.

14. The provisions of Section 424 of the Revenue Act of 1928 vest certain specified discretionary powers in the Commissioner of Internal Revenue which this Court is without jurisdiction to determine or review.

15. The provisions of Section 424(a) (1) of the Revenue Act of 1928 limit the jurisdiction of this court to hear and determine the issues in an action for the recovery of manufacturer's excise taxes paid or collected under the provisions of Section 900(3) of the Revenue Act of 1921, to actions instituted prior to April 30, 1928.

16. The provisions of Section 424 of the Revenue Act of 1928 provide a remedy for the recovery of manufactur-
[fol. 85] er's excise tax paid or collected under the provisions of Section 900(3) of the Revenue Act of 1921, which is exclusive of all other remedy.

17. The provisions of Section 424 of the Revenue Act of 1928 preclude recovery in this action of manufacturer's excise tax paid or collected under the provisions of Section 900(3) of the Revenue Act of 1921, regardless of the non-taxable claims of the plaintiff.

18. The plaintiff has failed to show by the evidence that the uses to which the "Weed Chains," manufactured and sold by it during the taxable periods, July, 1922, to December, 1922, inclusive, other than their use in connection with automobile trucks, automobile wagons, or other automobiles, required chains of the same design, type, size, weight, hardness, and tensile strength as is required for automobile truck, automobile wagon or other automobile uses.

19. Plaintiff has failed to show by the evidence that the tax in question in this action was imposed upon sales by its distributors, jobbers, or dealers to the consumer during the taxable periods July, 1922, to December, 1922, inclusive.

20. Plaintiff has failed to show by the evidence that the chains manufactured and sold by it during the taxable periods July, 1922, to December, 1922, were sold by plaintiff to the consumer for use on other than automobile trucks, automobile wagons or other automobiles.

E. F. McMahon.

[fol. 86] IN UNITED STATES DISTRICT COURT, DISTRICT OF CONNECTICUT

No. 3371. Law

AMERICAN CHAIN COMPANY, INCORPORATED, Plaintiff,

v.

ROBERT O. EATON, Collector of Internal Revenue for the District of Connecticut, Defendant

JUDGMENT

The above entitled action, having been commenced by writ, summons and complaint dated August 17, 1929, returnable to this court on the first Monday of September, 1929, the defendant's motion to dismiss having been denied, and amendment to the complaint, answer and reply having

been filed,—all as appears on file—was at a stated term of this court, held in and for the District of Connecticut at the Post Office Building in New Haven in said District on the 20th day of October, 1931, brought on for trial and tried before the Honorable Carroll C. Hincks, District Judge, pursuant to a stipulation of the parties in writing waiving a jury under Section 773 of Title 28 of the United States Code, and the court having heard the testimony of the parties and considered the briefs of counsel, rendered its decision on March 5, 1932, finding the issues for the plaintiff, and directing that judgment be entered for the [fol. 87] plaintiff in the amount of $172,470.36, with interest thereon from January 31, 1923,

Now, on motion of David S. Day, attorney for the plaintiff, it is ordered, adjudged and decreed that the plaintiff recover of the defendant the sum of $172,470.36 with interest thereon from January 31, 1923, according to law, and its costs taxed at $29.00.

Dated at New Haven, Connecticut, this 14 day of April, 1932.

Carroll C. Hincks, U. S. District Judge.

Approved as to form.
George H. Cohen, Assistant United States Attorney.
E. F. M. David S. Day, Attorney for Plaintiff.

[fol. 88] In United States District Court

No. 3371. Law

[Title omitted]

Certificate of Probable Cause to Prevent Execution Against the Defendant

I, Carroll C. Hincks, District Judge of the United States and sitting in the District Court of the United States for the District of Connecticut, on the 14 day of April, 1932, do hereby certify as follows:

1. The above entitled action was commenced on the 17th day of August, 1929, seeking the recovery of taxes paid by the plaintiff to the defendant. The taxes sought to be recovered amount to $183,365.49, with interest, and comprise

manufacturer's excise tax under Title 9, Section 900, Subdivision 3 of the Act of Congress of the United States entitled Revenue Act of 1921, exacted by the defendant from the plaintiff for the year 1922, and paid by the plaintiff to the defendant, and by him paid into the Treasury of the United States. Upon the trial of said action, judgment [fol. 89] was on the 14 day of April, 1932, entered in favor of the plaintiff and against the defendant for the recovery of $172,470.36, and interest thereon from January 31, 1923. with costs taxed at $29.00.

2. The acts done by the said defendant in exacting and collecting the said tax as above set forth, and paying the same into the Treasury of the United States, were done in the performance of his official duties acting under the direction of the Secretary of the Treasury, or other proper officer of the United States Government, and the defendant had probable cause for his acts, notwithstanding the fact that a part of said tax was erroneously collected and judgment has been rendered for a recovery thereof in said action as above set forth.

Carroll C. Hincks, United States District Judge.

Approved as to form.

George H. Cohen, Assistant United States Attorney.

David S. Day, Attorney for Plaintiff.

[fol. 90] IN UNITED STATES DISTRICT COURT

No. 3371. Law

[Title omitted]

ORDER ON FINDINGS AND CONCLUSIONS

Upon application of the United States Attorney for the District of Connecticut, it is hereby ordered, adjudged, and decreed that the Findings of Fact and Conclusions of Law made by the Court and set forth in the order entered herein on March 5, 1932, for the purposes of and on appeal shall constitute Special Findings of Fact and Conclusions of Law.

Dated at New Haven, Connecticut, this 29th day of April, 1932.

Carroll C. Hincks, United States District Judge.

NOTE RE ORDER EXTENDING TIME FOR FILING BILL OF EXCEPTIONS

No. 3371. Law

(The Order Extending Time for Filing Bill of Exceptions in this case is exactly like the Order Extending Time for Filing Bill of Exceptions in No. 3360 Law.)

[fol. 91] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

At Law. No. 3421

AMERICAN CHAIN COMPANY, INC., 929 Connecticut Avenue, Bridgeport, Connecticut, Plaintiff,

v.

ROBERT O. EATON, Collector of Internal Revenue of the United States of America for the District of Connecticut, Hartford, Connecticut, Defendant

COMPLAINT

UNITED STATES OF AMERICA,
District of Connecticut, ss:

The President of the United States of America to the Marshal of the District of Connecticut, Greeting:

You are hereby commanded to summon Robert O. Eaton, the Collector of Internal Revenue for the District of Connecticut, of North Haven in the State and District of Connecticut, defendant herein, to appear before the District Court of the United States for the District of Connecticut on the first Monday of April, 1930, then and there to answer unto American Chain Company, Inc., a corporation under [fol. 92] the laws of the State of New York, and having its principal office and place of business in Bridgeport in the County of Fairfield and State of Connecticut, plaintiff herein, in a civil action wherein the plaintiff complains and says:

1. That the plaintiff, at all times hereinafter mentioned, was and now is a corporation duly organized and existing

under and by virtue of the laws of the State of New York, and having its principal office and place of business in said City of Bridgeport in the State of Connecticut, and within the United States Internal Revenue District of the State of Connecticut, and brings this action in its own right.

2. That the defendant is a citizen of the United States and a resident of said North Haven, County of New Haven, State of Connecticut, and was at all times mentioned herein and now is a duly appointed, qualified and acting Collector of Internal Revenue of the United States of America for the District of Connecticut, in which District the City of Bridgeport is located.

3. That the plaintiff is and was at all times mentioned herein engaged in the manufacture and sale of tire chain grips, together with other commodities, and that said grips are and were sold for, and used on, solid and pneumatic tires of automotive vehicles, such as tractors, fire engines and equipment, snow plows, street sweepers, oilers, graders, etc. That said grips were manufactured to fit the tires of automotive vehicles whether of tractors, fire engines, and vehicles not subject to the excise tax, or automobiles and [fol. 93] trucks subject to tax within the purview of subdivision (3), Section 900 of Title IX, of the Revenue Act of 1921. That for the six months ended June 30, 1924, it sold to its customers said tire chain grips having a general commercial use other than on the tires of automobiles, trucks, and automobile wagons and paid tax thereon at 5% as and in the amount herein alleged.

4. That an excise tax at the rate of 5% under Title IX, Section 900, subdivision (3) of the Act of Congress of the United States, entitled "Revenue Act of 1921," was assessed against the plaintiff on sales of said tire chain grips and paid by it to the defendant as Collector of Internal Revenue of the United States of America aggregating the sum of One hundred five thousand thirty-one Dollars, and forty-three Cents ($105,031.43); that said payments made by plaintiff to defendant as its manufacturer's excise tax on the sales of tire chain grips made by it during said period, were supposed by plaintiff to be due and payable to the United States of America and to said defendant as Collector of Internal Revenue, as demanded of plaintiff under and by virtue of the said subdivision (3) of Section 900 of

Title IX of said Revenue Act of 1921; that the following is a schedule showing the amounts of payments made by plaintiff as above set forth, the months for which payments were made, and the dates on which the same were made:

[fol. 94]

1924	Amount of tax claimed as refund	Date of payment
January	$30,863.87	February 28, 1924
February	18,628.78	March 31, 1924
March	9,686.48	April 30, 1924
April	6,526.75	May 31, 1924
May	20,551.97	June 30, 1924
June	18,773.58	July 31, 1924
	$105,031.43	

5. That said tax represents 5% of the invoice price of all tire chain grips sold by the plaintiff from January 1st to June 30, 1924, inclusive; that said tax was not paid either directly or indirectly by the purchaser of said grips, but was paid entirely by the plaintiff at a flat price and no amount for excise tax was included therein; that plaintiff did not increase the price of said chain grips by the amount of the excise tax, but absorbed said amount of tax without passing it on to the purchasers.

6. That on or about the 15th day of February, 1928, the plaintiff filed with the defendant its claim for refund of the amount of $105,031.43, so paid to the defendant as Collector of Internal Revenue, and more particularly set forth in the above schedule of payments. That on or about the 15th day of March, 1928, the Commissioner of Internal Revenue by [fol. 95] notice to plaintiff rejected in full said claim for refund and refused to refund to plaintiff the said sum; that defendant and the Commissioner of Internal Revenue have at all times since said date refused to refund to plaintiff the amount of said payments made by plaintiff to defendant as above set forth.

7. That said tire chain grips sold and used for the tires of automotive vehicles are of a design, shape, size and of dimensions exactly similar to chain grips used for the tires of tractors, fire engines and equipment, and similar vehicles not subject to tax within the purview of subdivision (3), Section 900, of Title IX of the Revenue Act of 1921. That tire chain grips of exactly the same type and specifications

as those sold by plaintiff and tax paid during said period can be and are now commonly and profitably used upon both taxable and non-taxable automotive vehicles; that there is nothing in the design and construction of said grips sold by plaintiff as herein alleged to make them primarily adapted only for use on tires of automobiles, trucks or automobile wagons and that said grips may be and are used for other purposes and especially for the tires of tractors, fire engines and similar equipment; that the Commissioner of Internal Revenue has found and freely admitted to plaintiff that a substantial number of said tire chain grips were sold and used upon vehicles not subject to said tax but said Commissioner refuses to make refind of the tax paid as herein alleged on said grips so sold for the reason that the exact amount of sales therefor is not ascertainable; that said chain grips sold by plaintiff during said period were not [fol. 96] sold on or in connection with automobile trucks, automobile wagons, automobiles and/or motorcycles, or in connection with the sale thereof; that said tire chain grips were not parts or accessories for automobile trucks, automobile wagons, other automobiles and/or motorcycles within the intent and meaning of Section 900, Title IX of the Revenue Act of 1921 or any subdivision thereof, but were in fact commercial commodities interchangeable as to use on both taxable and non-taxable vehicles, were so advertised and were commonly sold for such general purposes.

Wherefore, plaintiff prays judgment against the defendant in the amount of One hundred five thousand thirty-one Dollars and forty-three Cents ($105,031.43), with interest as follows:

On $30,863.87 from February 28, 1924
On 18,628.78 from March 31, 1924
On 9,686.42 from April 30, 1924
On 6,526.75 from May 31, 1924
On 20,551.97 from June 30, 1924
On 18,773.58 from July 31, 1924

Arthur M. Marsh is recognized in the sum of $150.00 to prosecute, etc.

Hereof fail not, but of this writ, due service and return make.

Witness the Honorable Edwin S. Thomas, Judge of the District Court of the United States, for the District of Con-

[fol. 97] necticut, and the seal of said Court, at New Haven in said District, the 10th day of March, A. D. 1930.

C. E. Pickett, Clerk of the District Court of the United States for the District of Connecticut.

David S. Day, Attorney for Plaintiff. Office and Post Office address: 886 Main Street, Bridgeport, Connecticut. Long, Chamberlain & Nyce, Chas. P. Swindler, of Counsel, Washington, D. C.

NOTE RE MOTION TO DISMISS

No. 3421. Law

(The Motion to Dismiss in this case is exactly like the Motion to Dismiss in No. 3360 Law.)

[fol. 98] IN UNITED STATES DISTRICT COURT

No. 3421. Law

[Title omitted]

ORDER OVERRULING DEFENDANT'S MOTION TO DISMISS

This action, by writ and complaint claiming $105,031.43 damages, came to this court on the first Monday of April, 1930 and thence to the present time, when the parties appeared and were at issue on the defendant's motion to dismiss as on file.

The court having heard the parties, finds the issues for the plaintiff, and orders that the defendant's motion to dismiss be denied.

Dated at New Haven, this 1st day of June, 1931.

Edwin S. Thomas.

[fol. 99] IN UNITED STATES DISTRICT COURT

No. 3421. Law

[Title omitted]

ANSWER

Paragraph one of plaintiff's petition is admitted except defendant denies plaintiff brings this action in its own right.

Paragraph two of plaintiff's petition is admitted.

With respect to paragraph three of plaintiff's petition, defendant admits and alleges that plaintiff is and was at all times mentioned herein engaged in the manufacture and sale of chain grips and that said grips are and were primarily designed, manufactured, advertised, sold for and used on solid and pneumatic tires of automotive vehicles such as automobile trucks, automobile wagons, other automobiles and motorcycles, but defendant denies such chain grips were sold for and used on tractors, fire engines and equipment, snow plows, street sweepers, oilers, graders, etc. Further answering paragraph three defendant admits and alleges that said chain grips were designed, manufactured, advertised, and sold to fit the tires of automotive vehicles such as automobile trucks, automobile wagons, [fol. 100] other automobiles, and motorcycles as parts or accessories thereof within the purview of Section 900 of the Revenue Act of 1921, but defendant denies that such grips were designed, manufactured and sold for use on tractors, fire engines and vehicles not subject to excise tax. Further answering paragraph three defendant admits and alleges that during the year 1923 plaintiff sold to its customers namely, jobbers and distributors, said chain grips primarily designed, manufactured, and advertised for use on automobile trucks, automobile wagons, other automobiles and motorcycles and that plaintiff paid tax thereon at the rate of 5% in the amount of $105,031.43, but defendant specially denies that said chain grips have or had a general commercial use and defendant specially denies said chain grips were sold for use or used on other than the tires or automobile trucks, automobile wagons, other automobiles, and motorcycles.

Paragraph four of plaintiff's petition is admitted.

Defendant denies the averments of paragraph five of plaintiff's petition and alleges that the tax in question represents the amount shown on the manufacturer's excise tax returns filed by and assessed against plaintiff for each of the taxable periods involved.

Defendant denies the averments of paragraph seven of plaintiff's petition and alleges that the chain grips manufactured and sold by plaintiff during the taxable periods in question, upon the sale of which the tax in question was imposed, were primarily designed, manufactured, adver-

tised, and sold for use on or in connection with automobile [fol. 101] trucks, automobile wagons, other automobiles, and motorcycles as parts or accessories thereof within the meaning of the provisions of Section 900 of the Revenue Act of 1921.

——, Defendant, by John Buckley, United States Attorney; George H. Cohen, Assistant United States Attorney, His Attorneys.

IN UNITED STATES DISTRICT COURT

No. 3421. Law

[Title omitted]

PLAINTIFF'S REPLY

The plaintiff denies the allegations contained in the defendant's answer.

——, Plaintiff, by Marsh, Stoddard & Day, Its Attorneys.

[fol. 102] NOTE RE STIPULATION WAIVING TRIAL BY JURY

No. 3421. Law

(The Stipulation Waiving Trial by Jury in this case is exactly like the Stipulation Waiving Trial by Jury in No. 3360 Law.)

NOTE RE DEFENDANT'S REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

No. 3421. Law

(The Defendant's Request for Findings of Fact and Conclusions of Law in this case is exactly like the Defendant's Request for Findings of Fact and Conclusions of Law in No. 3360 Law.)

IN UNITED STATES DISTRICT COURT

No. 3421

[Title omitted]

MOTION FOR JUDGMENT

The defendant herein respectfully moves this court for judgment in favor of the defendant and against the plaintiff, for the following reasons:

[fol. 103] 1. Plaintiff has failed to show by the evidence the particular sales upon which it paid excise taxes, for the taxable periods January, 1924, to June, 1924, inclusive.

2. Plaintiff has failed to show by the evidence the particular sizes, types and weights of "Weed Chains" upon the sales of which excise taxes were imposed for the taxable periods January, 1924, to June, 1924, inclusive.

3. Plaintiff has failed to show by the evidence the numbers of "Weed Chains" sold by plaintiff to the consumer for use on other than automobile trucks, automobile wagons, or other automobiles during the taxable periods January, 1924, to June, 1924, inclusive.

4. Plaintiff has failed to show by the evidence the amount of tax paid on sales of "Weed Chains" by plaintiff to the consumer for use on other than automobile trucks, automobile wagons, or other automobiles for the taxable periods January, 1924, to June, 1924, inclusive.

5. Plaintiff has failed to show by the evidence the number, sizes, types and weights of "Weed Chains" sold by plaintiff to the consumer for use on other than automobile trucks, automobile wagons, or other automobiles during the taxable periods January, 1924, to June, 1924, inclusive.

6. Plaintiff has failed to show by the evidence the "Weed Chains" manufactured and sold by it during the taxable periods, January, 1924, to June, 1924, inclusive, were not [fol. 104] designed to be attached to or used in connection with automobile trucks, automobile wagons or other automobiles to add to their utility or ornamentation.

7. Plaintiff has failed to show by the evidence the "Weed Chains" manufactured and sold by it during the taxable

periods January, 1924, to June, 1924, inclusive, were not primarily adapted for use in connection with automobile trucks, automobile wagons, or other automobiles, whether or not essential to the operation or use of such vehicles.

8. Plaintiff has failed to sustain the burden of proof placed upon it in this action.

9. Plaintiff has failed to show by the evidence it has fully complied with the provisions of the Revenue Act of 1921 and Regulations 47 of the Treasury Department promulgated thereunder in that it has failed to avail itself of the exemption provisions of such Act and Articles 15 and 16 of such Regulations.

10. The evidence conclusively shows the "Weed Chains", manufactured and sold by plaintiff during the taxable periods, January, 1924, to June, 1924, inclusive, the sales of which were taxed, were designed to be attached to or used in connection with automobile trucks, automobile wagons or other automobiles, to add to their utility or ornamentation.

11. The evidence conclusively shows the "Weed Chains", manufactured and sold by plaintiff during the taxable periods, January, 1924, to June, 1924, inclusive, were pri- [fol. 105] marily adapted for use in connection with automobile trucks, automobile wagons, or other automobiles, whether or not essential to the operation or use of such vehicles.

12. The provisions of Section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of refund in this action of manufacturer's excise tax paid or collected under the provisions of Section 900(3) of the Revenue Act of 1921.

13. The provisions of Section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of instituting and maintaining this action, for the recovery of manufacturer's excise tax paid or collected under the provisions of Section 900(3) of the Revenue Act of 1921, subsequent to May 29, 1928.

14. The provisions of Section 424 of the Revenue Act of 1928 vest certain specified discretionary powers in the Com-

missioner of Internal Revenue which this Court is without jurisdiction to determine or review.

15. The provisions of Section 424(a) (1) of the Revenue Act of 1928 limit the jurisdiction of this court, to hear and determine the issues in an action for the recovery of manufacturer's excise taxes paid or collected under the provisions of Section 900(3) of the Revenue Act of 1921, to actions instituted prior to April 30, 1928.

16. The provisions of Section 424 of the Revenue Act of 1928 provide a remedy for the recovery of manufacturer's excise tax paid or collected under the provisions of Section 900(3) of the Revenue Act of 1921, which is exclusive of all other remedy.

[fol. 106] 17. The provisions of Section 424 of the Revenue Act of 1928 preclude recovery in this action of manufacturer's excise tax paid or collected under the provisions of Section 900(3) of the Revenue Act of 1921, regardless of the non-taxable claims of the plaintiff.

18. The plaintiff has failed to show by the evidence that the uses to which the "Weed Chains", manufactured and sold by it during the taxable periods, January, 1924, to June, 1924, inclusive, other than their use in connection with automobile trucks, automobile wagons or other automobiles, required chains of the same design, type, size, weight, hardness, and tensile strength as is required for automobile truck, automobile wagon or other automobile uses.

19. Plaintiff has failed to show by the evidence that the tax in question in this action was imposed upon sales by its distributors, jobbers, or dealers to the consumer during the taxable periods January, 1924, to June, 1924, inclusive.

20. Plaintiff has failed to show by the evidence that the chains manufactured and sold by it during the taxable periods January, 1924, to June, 1924, were sold by plaintiff to the consumer for use other than autombile trucks, automobile wagons or other automobiles.

E. F. McMahon.

[fol. 107] IN UNITED STATES DISTRICT COURT, DISTRICT OF CONNECTICUT

No. 3421. Law

AMERICAN CHAIN COMPANY, INCORPORATED, Plaintiff,

v.

ROBERT O. EATON, Collector of Internal Revenue for the District of Connecticut, Defendant

JUDGMENT

The above entitled action, having been commenced by writ, summons and complaint dated March 10, 1930, returnable to this court on the first Monday of April, 1930, the defendant's motion to dismiss having been denied, and Amendment to the complaint, answer and reply having been filed—all as appears on file—was at a stated term of this court, held in and for the District of Connecticut at the Post Office Building in New Haven in said district on the 20th day of October, 1931, brought on for trial and tried before the Honorable Carroll C. Hincks, District Judge, pursuant to a stipulation of the parties in writing waiving a jury under Section 773 of Title 28 of the United States Code, and the court having heard the testimony of the parties and considered the briefs of counsel, rendered its decision on March 5, 1932, finding the issues for the plaintiff, and directing that judgment be entered for the plaintiff in [fol. 108] the amount of $98,416.41, with interest thereon from July 31, 1924,

Now, on motion of David S. Day, attorney for the plaintiff, it is

Ordered, adjudged and decreed that the plaintiff recover of the defendant the sum of $98,416.41 with interest thereon from July 31, 1924, according to law, and its costs taxed at $27.00.

Dated at New Haven, Connecticut, this 14th day of April, 1932.

Carroll C. Hincks, U. S. District Judge.

Approved as to form.
George H. Cohen, Assistant United States Attorney.
E. F. M. David S. Day, Attorney for Plaintiff.

[fol. 109] IN UNITED STATES DISTRICT COURT

No. 3421. Law

[Title omitted]

CERTIFICATE OF PROBABLE CAUSE TO PREVENT EXECUTION AGAINST THE DEFENDANT

I, Carroll C. Hinks, District Judge of the United States and sitting in the District Court of the United States for the District of Connecticut, on the 14th day of April, 1932, do hereby certify as follows:

1. The above entitled action was commenced on the 10th day of March, 1930, seeking the recovery of taxes paid by the plaintiff to the defendant. The taxes sought to be recovered amount to $105,031.48, with interest, and comprise manufacturer's excise tax under Title 9, Section 900, Subdivision 3 of the Act of Congress of the United States entitled Revenue Act of 1921, exacted by the defendant from the plaintiff for the year 1924, and paid by the plaintiff to the defendant, and by him paid into the Treasury of the United States. Upon the trial of said action, judgment was [fol. 110] on the 14th day of April, 1932, entered in favor of the plaintiff and against the defendant for the recovery of $98,416.41, and interest thereon from July 31, 1924, with costs taxed at $27.00.

2. The acts done by the said defendant in exacting and collecting the said tax as above set forth, and paying the same into the Treasury of the United States, were done in the performance of his official duties acting under the direction of the Secretary of the Treasury, or other proper officer of the United States Government, and the defendant had probable cause for his acts, notwithstanding the fact that a part of said tax was erroneously collected and judgment has been rendered for a recovery thereof in said action as above set forth.

Carroll C. Hincks, United States District Judge.

Approved as to form.

George H. Cohen, Assistant United States Attorney.
David S. Day, Attorney for Plaintiff.

[fol. 111] IN UNITED STATES DISTRICT COURT

No. 3421. Law

[Title omitted]

ORDER ON FINDINGS AND CONCLUSIONS

Upon application of the United States Attorney for the District of Connecticut, it is hereby ordered, adjudged and decreed that the Findings of Fact and Conclusions of Law made by the Court and set forth in the Order entered herein on March 5, 1932, for the purposes of and on appeal shall constitute Special Findings of Fact and Conclusions of Law.

Dated at New Haven, Connecticut, this 29th day of April, 1932.

Carroll C. Hincks, United States District Judge.

NOTE RE ORDER EXTENDING TIME FOR FILING BILL OF EXCEPTIONS

No. 3421. Law

(The Order Extending Time for Filing Bill of Exceptions in this case is exactly like the Order Extending Bill of Exceptions in No. 3360 Law.)

[fol. 112] IN UNITED STATES DISTRICT COURT

Nos. 3360, 3371, 3421. Law

[Title omitted]

PETITION FOR APPEAL—Filed July 14, 1932

To the Honorable Carroll C. Hincks, District Judge:

The above-named defendant, feeling aggrieved by the decree rendered and judgment entered in each of the above-entitled cases on the 14th day of April, A. D., 1932, in favor of the plaintiff and against the defendant, does hereby appeal from said decree and judgment entered in each of the above-entitled cases to the Circuit Court of Appeals for

the Second Circuit for the reasons set forth in the assignment of errors filed herewith, and defendant prays that his appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree and judgment entered in each of the above-entitled cases was based, duly authenti- [fol. 113] cated, be sent to the United States Circuit Court of Appeals for the Second Circuit, under the rules of such court in such cases made and provided, and that such other and further proceedings be had as may be proper in the premises.

John Buckley, United States Attorney.

Copy duly served on plaintiff.

E. F. McM.

IN UNITED STATES DISTRICT COURT

Nos. 3360, 3371, 3421. Law

[Title omitted]

ORDER ALLOWING APPEAL—Filed July 14, 1932

On the application and motion of John Buckley, United States Attorney for the District of Connecticut, of counsel [fol. 114] for defendant, it is hereby ordered that an appeal to the United States Circuit Court of Appeals for the Second Circuit, from the decree and judgment entered in each of the above-entitled cases on the 14th day of April, A. D. 1932, be and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations, documents and all proceedings be forthwith transmitted to the United States Circuit Court of Appeals for the Second Circuit, and that such other and further proceedings be had as may be proper in the premises.

Edwin S. Thomas, United States District Judge.

Copy duly served on plaintiff.

E. F. McM.

[fols. 115 & 116] Citation in usual form, showing service on David S. Day, omitted in printing.

[fol. 117] IN UNITED STATES DISTRICT COURT

Law. Numbers 3360, 3371, 3421

[Title omitted]

ORDER CONSOLIDATING CASES FOR APPEAL—Filed July 14, 1932

Upon application of the United States Attorney, it is hereby ordered, adjudged and decreed that the above entitled actions be consolidated for and on appeal under one cover.

Edwin S. Thomas, United States District Judge.

Approved.

John Buckley, United States Attorney.

[fol. 118] IN UNITED STATES DISTRICT COURT

Law. Numbers 3360, 3371, 3421

[Title omitted]

ORDER FOR WITHDRAWAL OF EXHIBITS FOR TRANSMISSION TO UNITED STATES CIRCUIT COURT OF APPEALS FOR SECOND CIRCUIT—Filed July 14, 1932

Upon application of defendant to transmit the exhibits offered in the above-entitled actions, to the Circuit Court of Appeals, as physical exhibits and not to be printed in full in the transcript of record, it is considered by the Court to be necessary and proper because of the size and volume thereof, that the plaintiff's and defendant's exhibits offered in evidence at the trial of the above-entitled actions, or such thereof as may be determined by counsel for both parties as necessary in the presentation of their respective contentions, should be transmitted as original papers and exhibits to the United States Circuit Court of Appeals for the Second Circuit.

It is therefore ordered, adjudged and decreed that all of [fol. 119] plaintiff's and defendant's exhibits offered in evidence at the trial of the above-entitled actions, or such thereof as both parties may deem necessary, be withdrawn from the Clerk of this Court and transmitted by the Clerk

of this Court to the Second Circuit Court of Appeals, to be inspected in that Court upon review without being printed in the Transcript of Record, Rule 13, Paragraph 5, United States Circuit Court of Appeals for Second Circuit.

Edwin S. Thomas, United States District Judge.

Approved.

E.F.McM.

[fol. 120] IN UNITED STATES DISTRICT COURT

Nos. 3360, 3371, 3421. Law

[Title omitted]

ORDER APPROVING DEFENDANT'S NARRATIVE FORM BILL OF EXCEPTIONS—Filed July 14, 1932

This 14th day of July, A. D. 1932, the bill of exceptions in each and all of the above-entitled causes was presented to the Court, the same having been delivered to the clerk by the excepting party in conformity with the Rules of this Court, no objections thereto having been filed, the Court, upon consideration thereof and in conformity with the suggestions of counsel for both parties, has allowed and signed and ordered the said bill of exceptions to be filed in these cases as a true, correct and complete narrative form bill of exceptions, this 14th day of July, A. D. 1932.

Edwin S. Thomas, United States District Judge.

Approved as to form.

——— ———, Counsel for Plaintiff.

[fol. 121] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

Nos. 3360, 3371, 3421. Law

AMERICAN CHAIN COMPANY, INC., Plaintiff,

v.

ROBERT O. EATON, Collector of Internal Revenue, District of Connecticut, Defendant

Defendant's Narrative Form Bill of Exceptions

Be it remembered that on the trial of the above entitled causes, consolidated by agreement of counsel, in the Dis-

trict Court of the United States, District of Connecticut, at the October 1931 Term thereof, before Honorable Carroll S. Hincks, one of the Judges of said Court and a jury, wherein at the close of plaintiff's case, at the suggestion of the Court, both parties waived in writing their right to trial by jury, and the remainder of the evidence and the issues, both of fact and of law, were submitted to the Court for decision, the following proceedings were had:

[fol. 122] APPEARANCES

On behalf of the plaintiff, Chester I. Long, Esq., and Charles P. Swindler, Esq., of Long, Chamberlain & Nyce, Washington, D. C., and David S. Day, Esq., of Marsh, Stoddard & Day, Bridgeport, Connecticut, of Counsel.

On behalf of the defendant, John Buckley, Esq., United States Attorney, George H. Cohen, Esq., Ass't U. S. Attorney, Hartford, Connecticut and E. F. McMahon, Esq., Special Attorney, General Counsel's Office, Bureau of Internal Revenue, Washington, D. C., of Counsel.

The Court: An order may be entered consolidating Law Cases No-. 3360, 3371 and 3421 for trial in conformity with agreement of Counsel. Preliminary statements to panel waived by both parties.

STATEMENT TO JURY

GENTLEMEN OF THE JURY, the cases that are going to be presented to you this morning are cases in which the American Chain Company, Inc., of Bridgeport, Connecticut, is suing Robert O. Eaton, the Collector of Internal Revenue of the United States for the Collection District of Connecticut, for a very substantial recovery of taxes, which have heretofore been paid to the Government by the American Chain Company, under the claim that the taxes were illegally exacted. Both parties are represented by Counsel. If any of you gentlemen are stockholders in the American [fol. 123] Chain Company or if any of you are employed by it or have business relations with it or if any of you are personally acquainted with or have or have had dealings or relations with any of Counsel, you will make that fact known now. (At this point further discussion took place between the Court and Talesmen with reference to their qualifications to serve.)

Thereupon the Jury was then drawn and duly sworn by Clerk Pickett and statements of the cases were made by Counsel for the respective parties.

The Court: Exceptions may be entered for defendant to the order of Judge Thomas overruling defendant's motion to dismiss each of these cases as entered on the fifth day of February, 1931.

PLAINTIFF'S TESTIMONY

WILLIAM THOMAS MORRIS, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Long:

My name is William Thomas Morris, Vice President and General Manager of the American Chain Company. The common usual name for the tire chains involved in this suit is Weed Chains. I have been engaged in making Weed Chains since about 1905. The American Chain Company was incorporated about 1910 or 1911 as successor to the Weed Chain Tire Grip Company. The American Chain [fol. 124] Company was making Weed Chains from July 1, 1922 to June 30, 1924. I am personally familiar with the kind and character of Weed Chains made during that period. I supervised the organization during that time and had my trips through the assembling rooms and plant. I have been familiar with the making of those chains ever since my employment about 1905. I have been General Manager since about 1917. The chains made from July 1922 to July 1924, were similar in design and make to those that are manufactured by the company at the present time, October, 1931. Chains were manufactured that would fit the standard makes of tires of all automobiles, trucks, and road machines, regardless of their use. Weed Chains were manufactured and sold for use on motor vehicles of all kinds. I have in the courtroom samples of the representative sizes of these Weed Chains. In 1905 I put the chains together myself as the only employee, then we later had two employees and developed a business employing 175 employees. I stretched two pieces of side chain along a table and

threaded the cross members into the side chain and then pinched them down with a bolt cut. In 1910 or 1911 we built the plant at Bridgeport, Connecticut and purchased the chain interest of the Oneida Community Company of Oneida, New York. They were makers of the weldless chain we used for side members. In 1914 or 1915 we purchased the Standard Chain Company, York, Pa., manufacturers of the cross chain, that is of the cross members. After the plant moved from New York to Bridgeport, I went to the Pacific Coast states for five months on the supervision of [fol. 125] sales and at the same time did the practical patent work for the company. During 1922 to 1924 we were making these Weed Chains at Bridgeport, Connecticut and York, Pennsylvania. During this period I was supervising sales as well as the manufacture. The method and plan or policy of our sales during July 1922 to July 1924 was that we sold all of our goods direct to the jobber, who in turn sold them to the dealer, who in turn sold them to the consumer. That was the method and policy of selling at that time and it is today. In carrying out that policy or method of sales, I travelled throughout the United States, Canada and Continental Europe. I spent five months in England handling the Company's affairs and selling the tire chains. Plaintiff's Exhibit 1, consisting of a bag containing one pair of chains, was identified by the witness as Weed Tire Chains similar to those made during the taxable periods and offered and received in evidence. Those chains are stamped on hook, size 30 x 3½ and made to fit 30 x 3½ tires. The size of the chains always follow the size of the tires. The chains are laid over the top of the tire, the wheel is run over the chain a short length and they are hooked at the bottom. Any person, skilled or unskilled, can put them on as a rule. Plaintiff's Exhibit 2, consisting of a bag containing one pair of Weed Tire Chains for a 34 x 4.95 tire as identified by the witness was offered and received in evidence. Plaintiff's Exhibit 3, consisting of a bag containing one pair of Weed Tire Chains for a 35 x 5 tire as identified by the witness was offered and received in evidence. Plaintiff's Exhibit 4, consisting of a bag containing one pair of [fol. 126] Weed Tire Chains for a 35 x 5 tire as identified by the witness was offered and received in evidence. Plaintiff's Exhibit 5, consisting of a bag containing one pair of Weed Tire Chains for a 36 x 6 tire as identified by the

witness was offered and received in evidence. Plaintiff's Exhibit 6, consisting of a bag containing one pair of Weed Tire Chains for a 40 x 8 tire as identified by the witness was offered and received in evidence. Plaintiff's Exhibit 7, consisting of a bag containing one pair of Weed Tire Chains for a 36 x 6 tire as identified by the witness was offered and received in evidence. Plaintiff's Exhibit 8, consisting of a bag containing one pair of Weed Tire Chains for a 40 x 5 tire as identified by the witness was offered and received in evidence. Plaintiff's Exhibits 1, 2 and 3 are marked Weeds, meaning Weed tire chains, Exhibits 4, 5 and 6 are for single pneumatic tires. Exhibit 7 is for dual pneumatic tires. A dual pneumatic is where two single pneumatic tires are mounted on one rim of the automobile wheel. A single pneumatic tire chain is for one single pneumatic tire and a dual pneumatic tire chain is for a dual pneumatic tire. The difference in the single and dual pneumatic tire chains is that the dual is wider and covers two tires. Exhibit 8 is for a 40 x 6 single solid tire. Plaintiff's Exhibit 9, consisting of a bag containing one pair of Weed Tire Chains for a 40 x 6 single solid tire as identified by the witness was offered and received in evidence. Plaintiff's Exhibit 10, consisting of a bag containing one pair of Weed Tire Chains for a 40 x 10 single solid tire or a 40 x 5 dual solid tire as identified by the witness was offered and received in evidence. Plaintiff's Exhibit 11, consisting of [fol. 127] a bag containing one pair of Weed Tire Chains for a 40 x 14 single solid tire or a 40 x 7 dual solid tire as identified by the witness was offered and received in evidence. A Weed Chain of an appropriate size will fit a tractor tire of the same size as the truck tire. A suitable size will fit just as well on the tractor tire as it will on the truck tire. As salesman and supervisor of sales I observed the use of these Weed Chains we manufactured when in different parts of the United States.

Q. Had the above size of Weed chains for use on automobiles or trucks any peculiar characteristics which were not identical with Weed chains for use on tractors, fire apparatus and road machines?

Mr. McMahon: The Government interposes an objection to the question for the reason the witness has not shown himself qualified to answer; it is not the best evidence; it

calls for a conclusion of the witness; assumes facts to be true which have not been shown by the evidence and usurps the power of the jury.

The Court: I understand the question asks for physical differences, if any, between the two chains.

Mr. McMahon: If the Court please, I can see your view of the question asked but the question that is bothering me is: Does that lead to the question of design or does it specifically refer to particular sizes of chains. In other words the question is too general to apply to anything other [fol. 128] than design. Peculiar characteristics are part of design and this witness certainly isn't qualified to testify as to that.

Mr. Long: This witness is qualified to testify as to design. They had to make a chain.

The Court: I will allow the question.

Mr. McMahon: May I ask one question. What are "the above chains."

Mr. Long: The above sizes. We have had the size here—the above sizes of Weed Chains.

Mr. McMahon: Note an exception to the question ruling.

A. No, they did not.

The Weed Chains manufactured and sold by us during the taxable periods could be detached from automobile or truck tires and used on tires of the same size on tractors, fire apparatus or road machines without any change in the chains.

Q. Were the Weed Chains manufactured and sold by the American Chain Company upon which the taxes in this suit were paid, interchangeable for use on tractors, fire apparatus and road machines?

Mr. McMahon: The Government interposes an objection to that question as applied.

The Court: I will admit it.

Mr. McMahon: Note an exception on the ground that the witness had not shown himself qualified to answer; it calls for a conclusion of the witness; assumes facts to be true [fol. 129] that are not shown by the evidence; is not the best evidence and usurps the power of the jury with respect to use.

The Court: Exception noted.

A. They were.

Q. Were suitable sizes of such Weed Chains manufactured and sold during the taxable periods, used generally on automobiles and trucks, interchangeable for use on tractors, fire apparatus and road machines?

Mr. McMahon: The Government interposes an objection to that question for the reason that the witness has not shown himself qualified to answer; it calls for the conclusion of the witness; assumes facts to be true that are not shown by the evidence; it is not the best evidence obtainable; and usurps the power of the jury.

The Court: Admitted.

Mr. McMahon: Note an exception.

The Court: Exception noted. You may answer.

A. They were.

The American Chain Company sold no Weed Chains with the car; they were all sold through the jobber. The American Chain Company is the sole owner of the claims involved in these three suits No action has been had thereon before Congress or any Governmental Department, except on claims filed and rejected and no part of such claims have ever been sold or assigned. The same remain unpaid with [fol. 130] interest due from dates of payment. During the taxable periods there was no difference in our selling policy in one part of the United States and Canada from the way we did business in another part. We sold these chains everywhere through jobbers. There were no differences in the kind or sizes of Weed Chains that we sold in one part of the United States and Canada from what we sold in any other part. We sold Weed Chains in Continental Europe, Australia and South Africa. We had a different branch in England. We called it a different name than the Weed Tire Chain. It was the Parsons non-skid chain. It was somewhat different in construction from those we sold in the United States. There was no difference in the general use of Weed Chains in foreign countries from their use in the United States. I have seen Weed Chains used in all parts of the United States and Canada. I have seen Weed chains used on tractors and I am familiar with the requirements of that use. I can state the different requirements of tractor use to the extent that it is necessary for traction to stop

wheels slipping and cause the vehicle to go ahead. Plaintiff's Exhibits 1 to 11, inclusive, have all been made since June 30, 1924. They are similarly representative of all of the Weed Chains made during the taxable periods. Chains of similar sizes to the ones introduced in evidence as Exhibits 1 to 11, inclusive, were used on trucks, fire engines and road machines during the periods July 1922 to July 1924.

Cross-examination.

By Mr. McMahon:

I started assembling chains for the Weed Chain Tire Grip [fol. 131] Company in 1905. The internal combustion automobile was in use at that time. I wouldn't say positively that the Internal Combustion Truck or tractor was in use at that time. I handled patents for the company from a practical standpoint for certain periods of time. By that I mean gathering evidence for patent cases back and forth across the country. I have seen the letters patent taken out by Mr. Weed, but it is sometime since.

Q. Can you tell me about when the base patent on these tire chains was taken out?

A. You mean the Weed patent.

Q. (Last question read by the reporter.)

A. You mean the Weed Patent.

Q. Yes.

Mr. Long: We object to that unless it is shown that the Weed patent was the basic patent. Will you state that that was the basic patent?

Mr. McMahon: I am asking him a question. I want to know if he knows.

A. Why, if you ask me about the Weed patent I think the application was made in 1903 and issued in 1904. That is from memory, of course.

Q. Mr. Morris, I hand you what has been marked Defendant's Exhibit A and ask you to state what that is.

A. It is a grip tread for pneumatic tires, Patent No. 768,495, issued to Harry D. Weed under date of August 23, 1904.

Q. I hand you what has been marked Defendant's Exhibit B and ask you to state what that is.

A. Patent No. 723,299, issued to Harry Parsons under date of March 24, 1903.

[fol. 132] Q. Did you ever handle that patent? Did you have anything to do with it?

A. I have seen this patent in the early days.

Q. Do you know about it?

A. Yes, I do.

Q. Did you ever have anything to do with those letters patent in your handling of letters patent for the American Chain Company?

A. In 1915, I consummated the purchase of these patents in England.

Q. I hand you what has been marked Defendant's Exhibit C and ask you to state what that is.

A. It is Patent 953,673, issued to H. D. Weed, March 29, 1910, and was for an improvement on Weed tire chains.

Q. I hand you what has been marked Defendant's Exhibit D and ask you to state what that is.

A. It is Patent 1,030,032, issued to F. A. Strong under date of June 18, 1912 and it was called a blowout chain on a tire repair device.

Q. Did you ever have anything to do with that patent in your duties in connection with patents of the American Chain Company?

A. Yes, I did. We assembled this. I assembled this.

Q. I hand you what has been marked Defendant's Exhibit E and ask you to state what that is.

A. It is Patent 1,104,307, issued to H. W. Loder under date of January 24, 1922.

Q. Did you ever have anything to do in connection with that patent?

A. I don't remember anything about this construction at all.

Q. Is there any question in your mind as to whether or not this patent was obtained or assigned to the American Chain Company?

A. It says it was assigned to the American Chain Company on the top there.

[fol. 133] Q. Do you have the original letters patent represented by these Exhibits A, B, C, D, and E, in your possession?

A. Not in my possession. We have them, however, in the office—in our own office.

Q. Could you produce those letters patent or would you be willing to admit that Exhibits A, B, C, D and E are true copies or representations of what that purports to be as identified by you?

A. We can secure those in the office at Bridgeport—the original patents.

Q. Will you secure them for us tonight and have them here for us tomorrow?

A. Yes, sir.

I testified on direct examination that during the taxable periods I supervised directly as general manager the sales made and also testified as to the selling policy. During the taxable periods, we advertised these Weed Chains for sale to both the jobber and the public.

Mr. McMahon: Is it the rule for the defendant to offer evidence on cross examination?

The Court: Unless it is otherwise admissible.

Mr. McMahon: Very well, the defendant offers in evidence Defendant's Exhibits A, B, C, D and E as identified by this witness.

Mr. Long: Now we object to them because it is not proper cross examination. Second, because outside of the Parsons Patent, the chains for which taxes were assessed and which the demand is made for the refund during this period were not manufactured under any of these patents except the [fol. 134] Parsons patent. I don't know as to these other patents. We never had a chance to examine them.

Mr. Long: We make the objection as to all of them except the Parsons patent and if necessary we desire to ask some preliminary question of the witness.

The Court: Objection sustained.

Mr. McMahon: An exception on behalf of the defendant.

Mr. Long: We don't object to Defendant's Exhibit B, the Parsons Patent on any ground.

Mr. McMahon: The defendant excepts to the exclusion of Defendant's Exhibits A, C, D and E.

The Court: The exhibits so excluded will be marked for identification only.

Defendant's Exhibit F, a price list of Weed Chains for pneumatic and solid truck tires, put out by the American Chain Company, in effect April 18, 1923, and circulated to

its trade, as identified by the witness offered and admitted in evidence. Defendant's Exhibit G, a Weed chain circular for solid tires, as identified by the witness, marked for identification. Defendant's Exhibit H, a catalogue issued December 1, 1923, as to prices being effective on tire chains, cross chains, both solid and pneumatic, and unit chains, chain adjusters—issued effective December 1, 1923, as identified by the witness, offered and admitted in evidence. Defendant's Exhibit I, a pamphlet of Weed chains for Fordson tractors with special wheel equipment, effective [fol. 135] December 1, 1923, put out by plaintiff about that date, as identified by the witness, offered and admitted in evidence. Defendant's Exhibit J, a circular on Weed De-Luxe tire chains, marked patented January 24, 1922, issued after that date, on the back containing "patented June 3, 1918; January 24, 1922; other patents pending," as identified by the witness, marked for identification. Tire chains of appropriate size will fit on the tires of automobiles, trucks and tractors. I know of no tractors that Plaintiff's Exhibit 1, the 30 x 3½ chain will fit. I know of no tractors that Plaintiff's Exhibits 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 will fit. The size of the chain in Plaintiff's Exhibit 2, is not the same size chain as the chain in Plaintiff's Exhibit 11. The chain shown in Plaintiff's Exhibit 11 is heavier than the chain in Plaintiff's Exhibit 1. That applies to Plaintiff's Exhibits 10, 9, 8, 7, 6, 5 and 4 being heavier than Exhibit 1. I should say in each case larger as to width and larger as to circumference with respect to Exhibits 4 to 11 as well as to size and gauge of wire. Exhibits 3 to 11 are heavier gauge wire than Exhibit 2. Plaintiff's Exhibits 4 to 11 are larger as to gauge of wire, width and length than Plaintiff's Exhibit 3. Exhibit 5 is heavier than Exhibit 4. Exhibit 6 is slightly heavier gauge than Exhibit 5 and I would say the diameter of the wire in Exhibits 6 and 7 is about the same. The chain is longer in width and circumference in Exhibit 6 as against Exhibit 7. Exhibit 8 has a larger gauge wire than Exhibit 7 and the width and length is longer in 8 than 7. Exhibit 9 is heavier gauge wire than Exhibit 8. The gauge of wire in Exhibits 9 and 10 are [fol. 136] about the same. The circumference is about the same and the width of Exhibit 10 is longer than Exhibit 9. Exhibit 11 is longer in width than 10, otherwise about the same. I know of no automobile that a 40 x 14 Single Solid

or a 40 x 7 dual solid will fit. I believe a Mack truck is made with that size tire. I know of no make of truck Plaintiff's Exhibits 3, 4, 5, 6, 7, 8, 9, 10 and 11 will fit. With respect to Exhibits 2 and 3, they did not have balloon tires during the taxable periods. Plaintiff's Exhibit 7, the 36 x 6 dual pneumatic is longer than Plaintiff's Exhibit 5, a 36 x 6 single pneumatic, that is 7 is longer in the cross chain, shorter in circumference and is heavier gauge wire than Exhibit 5. From 1905 to a later date those chains were made under the Weed Patent.

Q. I hand you Defendant's Exhibits A, B, C, D and E and ask you to pick out the Weed Patent.

Q. Have you picked out the Weed Patent?

A. I have.

Q. Is that the patent under which you assembled chains during that period?

Mr. Long: We object to that as being immaterial unless it is confined to the taxable period.

Q. I hand you what has been marked Defendant's Exhibit A for identification and ask you to state if that exhibit, marked for identification, covers the Weed patent?

Mr. Long: Now, we object to that because—

[fol. 137] Q. Let me finish—Covering the chains which you assembled with your own hands when you first began to work for the Weed Tire Chain Company.

The Court: How is that material?

Mr. McMahon: It is coming down the line.

Mr. Long: We object to it for the same reasons given before. It is not proper cross examination and is immaterial, incompetent and irrelevant to any of the issues in this case, covering chains manufactured and sold during the taxable period.

Mr. Long: On examination in chief I didn't ask you what the patent was.

The Court: I will sustain the objection to the pending question.

Mr. McMahon: Note an exception.

Weed Chains are named after Harry D. Weed. Harry D. Weed has nothing to do with the manufacturing and selling of Exhibits 1 to 11, inclusive. He is still alive and

very healthy. He is not in the Court room. Plaintiff's Exhibits 1 to 11 are similar to chains manufactured and sold during the taxable period on which tax was paid. There is no difference in construction, except the possible change in weight of both the side chains and cross chains, that is thickness of gauge of the side and cross chains. It is just possible we increased the width of the cross chain or the side chain.

Q. I believe, Mr. Morris, you told us of the difference existing in the construction of Exhibits 1 to 11 between the [fol. 138] taxable period and the period in which those chains were made, did you not?

A. I think I did.

Q. Were the differences covering the change in construction covered by patents covering an improvement in the art of manufacture as compared to the chains which you manufactured during the taxable periods?

Mr. Long: We object to that as being immaterial, incompetent and irrelevant and having no relation to the issues involved in this case as well as not being proper cross examination.

The Court: Sustained.

Mr. McMahon: Note an exception.

Part of the chain is brassplated and part of it galvanized as an anti-rust finish, to keep it from rusting. Both keep it from rusting. The difference in construction of the chains covered by Exhibits 1 to 11, inclusive, and the chains manufactured under Defendant's Exhibit B is that the construction shown in B, the Parsons patent, was of a diagonal type as against the ladder type construction that we manufactured during the taxable period. In Defendant's Exhibit B, the cross chain runs diagonally across the periphery of the tire, while in the chains covered by Plaintiff's Exhibits 1 to 11 the cross chains run directly across the periphery of the tire, that is straight across. Defendant's Exhibit B shows what looks to be a cable member, but a side chain was used on this construction just the same as on that. The same weight and size of chain was used on a compar- [fol. 139] able size. Plaintiff's Exhibits 1 to 11, inclusive, are not exactly of the same construction as the chains which I manufactured under Exhibit B. I described the difference in my answer. There is practically no difference be-

tween the chains we constructed from July 1922 to June 1924, as to construction, with the exception of the weight of the cross member chain and side member. We never used cable on it, I believe we became licensed under this patent in the latter part of 1905 or early part of 1906 and we purchased the patent outright about 1914 or 1915.

Redirect examination.

By Mr. Long:

On cross examination I testified I did not know the name of a truck or tractor that used these numbers of chains. As I understood the question it meant the name or style of the truck or tractor or the size of the chain. My answers were to that point in each case. I did not mean to testify these numbers were not used on different makes of trucks and different makes of tractors.

F. R. Baker, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Day:

I am purchasing agent for the American LaFrance & Foamite Corporation, Elmira, N. Y. I have been connected with that corporation since 1912. During July, 1922 to June, 1924, inclusive, I was in charge of the follow-[fol. 140] up division under the supervision of the purchasing agent. The product of the corporation is fire apparatus and all other types of fire fighting equipment. They do business throughout the United States, Canada and some foreign countries. The corporation during the taxable periods, made pumping cars, lighter wagons known as combination cars, water towers, tractors and equipment in general to be placed on any type of vehicles. A pumping car is a fire car equipped with a water pump to pump water from hydrants into the fire hose. These various items of equipment during the taxable period were generally mounted on automobile chassis. We made our own chassis, with solid and pneumatic tires. We also made fire equipment during that period which was sold to the trade for mounting on

automobile chasses generally. We mounted some on chassis purchased from outside manufacturers. Our largest at that time was Fords, although we have built equipment for other types of passenger cars and trucks. That applies to what we mounted and what we sold for mounting. Plaintiff's Exhibit 12—Catalogue of American La France & Foamite Corporation, No. 20, as identified by the witness was offered and admitted in evidence. When specified by the purchaser our various items of fire equipment, when sold, were equipped with Weed Tire Chains. There were a considerable number of such specifications. During the taxable period our corporation purchased American Chain Company tire chains from that company for the purpose of equipping these items of fire apparatus. At that time we purchased chains for the standard type 17 [fol. 141] four-wheeled tractors described on Page 22 of Exhibit 12. Tire chains of the type manufactured by plaintiff in this case were generally used on fire apparatus throughout the country. There were about fifty manufacturers of fire apparatus in the United States during July 1922 to June 1924, inclusive, who were manufacturing various kinds of fire apparatus, including motor driven fire apparatus similar to ours. During the taxable periods, we purchased tire chains to fit 38 x 7 single pneumatics, 40 x 8 single pneumatics, 33 x 5 single pneumatics, 32 x 4½ single pneumatics, 30 x 8 single pneumatics, 35 x 5 single pneumatics, 36 x 6 single pneumatics, 36 x 5 single solids, 36 x 5 dual solids, 36 x 4 single solids, 36 x 4 dual solids, 38 x 4 single solids, 38 x 4 dual solids, 40 x 5 single solids, 40 x 7 single solids, 36 x 8 single solids, 36 x 3½ dual solids, 46 x 7 single solids, 36 x 8 single solids, 36 x 4½ dual solids, 38 x 8 single solids, 40 x 6 single solids, 40 x 8 single solids, 36 x 9 single solids, 35 x 4 dual solids, 38 x 7 single solids, 38 x 10 single solids, 36 x 3½ dual solids, 38 x 3½ dual solids. These sizes cover chains for equipment mounted on our own chassis and on the chasses of other automobiles. It includes both classes. These tire chains were marked by me and went out as part of the equipment of this fire apparatus only when specified by the customers. The number of items of fire apparatus on which tire chains were specified was a small proportion of the total number of items of apparatus sold by the company.

[fol. 142] Cross-examination.

By Mr. McMahon:

The four-wheeled tractor shown on page 22 of Exhibit 12 is actually mounted on an automobile chassis that we manufactured for that purpose. During the taxable period, my travels were rather limited. I was not out looking for tire chains on fire apparatus. I know they were equipped with tire chains, but I don't know as I can truthfully say that I have seen very many sets of tire chains on fire apparatus throughout the country. I saw them in Elmira. I am not acquainted with what is inside the bags of Plaintiff's Exhibits 1 to 11 and could not answer your question as to whether one of them contains a 38 x 7 single pneumatic pair of chains, except from the notations on the bags as to sizes. The chains we purchased from the American Chain Company during the taxable periods had notations as to size on the outside of the bags. Plaintiff's Exhibit 6 is similar to the bags I saw enclosing chains during the taxable periods and contains much the same printed matter. The 38 x 7 single pneumatic tire might be on any type apparatus except the rear wheels of the four-wheeled tractor, the tires and wheels are changed in a great many cases on fire cars, depending upon the customer's specifications. I cannot answer the question as to whether we ordinarily shipped a pair of 38 x 7 chains with our standard type No. 38 triple combination pumping chemical and hose car. We did not make passenger car vehicles for fire chiefs. I saw one in Elmira during the taxable period. I cannot answer how many pieces of fire apparatus of our make or any other make I saw in Elmira during the taxable period. I have [fol. 143] seen chains actually in use on fire apparatus during the taxable period at the factory on experimental cars. They were placed on the finished product before shipping, removed and returned to the bag. I saw those chains actually in use on our finished product after it left the factory at Elmira Fire Department, that is one set of chains, but I cannot tell you the size. Plaintiff's Exhibit 12 does not contain a list or pictures of cars or equipment requiring all of the different sizes of tire chains which I testified we purchased from the American Chain Company during the taxable periods.

Mr. McMahon: I move to strike out the testimony of this witness covering the use of tire chains throughout the country.

The Court: Denied.

Mr. McMahon: Note an exception.

The Court: Exception noted.

Redirect examination.

By Mr. Day:

Plaintiff's Exhibit 12 does not contain the list or pictures of all sizes of tires upon which these chains were used that my testimony showed we purchased. Wheels on fire apparatus are of a special character in a good many cases and the customers demand what they think best. For instance in that Catalogue you will find pictures of vehicles showing pneumatic tires upon which the specifications are written that call for solid tires.

[fol. 144] Recross-examination.

By Mr. McMahon:

With the special wheels we are called upon to provide a chain that will fit that tire. We purchased chains from the American Chain Company, which we shipped with our own apparatus and other makes of chassis with our fire equipment mounted on it. Those chasses were automobile and truck chasses. We shipped them with the completed articles as part of the original equipment. We mounted our equipment on Fords to quite an extent and used Brockways to quite an extent and further than that I won't include any more. The bags containing chains as shown by Plaintiff's Exhibits 5, 6, 8 and 9 show they contain chains of the sizes mentioned in my direct examination.

Fred B. Alger, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Long:

I am sales manager of the Braxton Motor Car Company, Middleboro, Mass. That company manufactures a motor

driven fire apparatus and did during the taxable periods. Our fire apparatus is mounted on trucks of our own manufacture in some cases and in other cases on other types of trucks, such as Fords, Stewarts, Reo's that I recall, perhaps others. During the taxable periods my company purchased chains, Weed Chains, principally from the Butts & Ordway Company of Boston, Mass., which were sold with [fol. 145] the apparatus to purchasers, upon orders of such purchasers. We did business in all six of the New England States and the States of New York and New Jersey. We equipped our apparatus principally with sizes 36 x 6 single pneumatics, 38 x 7 single pneumatics and 40 x 8 single pneumatics. These sizes fit the tires of the trucks that were part of our own manufacture. Additional sizes were for the other trucks I mentioned, but I could not give those sizes. I could not swear to having seen chains in use on fire apparatus during the taxable period, but they were purchased and sold by our company during that period.

Cross-examination.

By Mr. McMahon:

I distinguished the sizes of chains by referring to the files in which I find the actual bills from the Butts & Ordway Company. I could not swear to seeing those chains come into our institution during the taxable period.

Henry H. Heitmann, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Swindler:

During July, 1922 to June, 1924, inclusive, I was Chief of the Waterbury, Connecticut, Fire Department. I have been connected with that department for 39 years. In certain parts of the year we used Weed chains, not always, [fol. 146] during that taxable period. During that period we had different types of equipment, 19 pieces in all, such as hook and ladder, trucks, pumping engines, triple combination hose and pump, hose wagon, chemical engines,

not all of them of the American La France make. Two Locomobiles were made in Bridgeport, and one Robbins pumping engine was made in St. Louis. We used Weed chains on all in the taxable period. On the Locomobile were single pneumatic tires 38 x 6 and on the Robbins 38 x 6 in the rear and 35 x 5 front. We had duel tires 37-inch and two dual straight 38 inch. One machine there used 38 x 8 rear and 38 x 4 in front. The Dayton Ellis used 38 x 4 duals, two on the rear and on each wheel. The triple combination pumping chemical and hose, solid tires, 38 x 4 dual rear and 38 x 4 front. The triple combination used the same sizes. The Dayton Ellis used 38 x 4 dual rear and 38 x 4 front. The other pieces used practically all the same sizes. The tires are the same size. During snow and rainy weather we put them on. During snow we kept them on continually. Sometimes we used chains on all four wheels, that is during heavy snow. Plaintiff's Exhibit 13, photostat of fire equipment superimposed on a Locomobile automobile chassis, purchased in 1908 for Waterbury Fire Department, as identified by witness, offered and admitted in evidence.

Cross-examination.

By Mr. McMahon:

I have given the sizes 38 x 8, 38 x 6, 38 x 5 and 38 x 4 single and some dual solids. We also had a Cadillac and [fol. 147] Buick passenger cars during that period on which I think we used 35 x 4½, I am not sure. The pumpers and hook and ladder wagons, chemical wagons are all mounted on a truck chassis. The chains used on the fire apparatus was heavier than the chains used on the Cadillac and Buick.

Redirect examination.

By Mr. Swindler:

We purchased the Weed chains used on our equipment during the taxable period from most any hardware store. They were purchased according to the size of the tire of the vehicles on which used. I told them the size and they furnished the chain for it. The difference I spoke of in chains for automobiles and apparatus was in the size of

the chains and heavier chain was used. The difference was due to both size and weight. Exhibit 13 shows a chassis of standard size, it was standard equipment at that time. The Locomobile people at that time, I believe, made all chain driven chassis. (Recalled.) The department owned and operated a fire chief's car on which we used Weed Chains. We had a Locomobile fire chief's car in 1912 or 1913 on which we used Weed Chains. Those tires were not of the same size as is represented in Exhibit 13, it wasn't quite as large as that. We used Weed Chains during the taxable periods on the fire chief's car as well as the apparatus.

Q. Did these chains function as well on both vehicles or on one vehicle as on the other?

Mr. McMahon: The Government interposes an objection [fol. 148] to the question for the reason it calls for the conclusion of the witness, the witness is not qualified to answer, it assumes facts to be true which have not been shown by the evidence, it is immaterial to the issues in this case, it is incompetent and not the best evidence and usurps the power of the jury.

Mr. Swindler: Your Honor, this witness is qualified to testify to the use of these chains both in an automobile, as alleged by the Government, and upon the fire apparatus.

The Court: I think he is. I will rule that way.

Mr. McMahon: The defendant, in this connection wishes to call the Court's attention to the fact that he is asking the witness not if they used it but if it functioned just as well.

The Court: This witness is qualified to answer. He is chief of the fire department and if he can't testify as to the operation of the apparatus under which he has charge I don't know who can.

Mr. McMahon: Do I understand that the question goes only to the matter of operation of the apparatus or do I understand that the question of function there applies to the question of design or the question of adaptability.

Mr. Swindler: The question speaks for itself.

The Court: I don't know what counsel understands by the question—if he will explain it to the Court.

[fol. 149] (Question read by reporter.)

The Court: I will overrule the objection.

Mr. McMahon: Note an exception.

A. They functioned very good on both touring cars and the apparatus.

Q. Did they function equally as well?

A. Equally as well.

Mr. McMahon: The Government objects to the answer because it has not had an opportunity to interpose an objection. I move to strike the answer of the witness for the reason that the witness has not shown himself qualified to answer, it calls for the conclusion of the witness, assumes facts to be true not shown by the evidence and usurps the power of the jury.

The Court: Motion denied.

Mr. McMahon: Note an exception to the ruling of the Court.

Recross-examination.

By Mr. McMahon:

I didn't mention the word "function" I don't believe. What I meant was that they functioned all right or worked all right. That is as far as I can say—adapted for the car. That is about all—functioned that way. I mean by that the chains were used and they prevented the car from slipping or skidding. I do not mean anything further than that.

[fol. 150] Henry A. Steeves, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Swindler:

During June, 1922 to July, 1924, I was treasurer of the Somerville Sales and Service Authorized Ford Dealers, Somerville, Mass., engaged in the sale of automobiles, cars, trucks and tractors. During that period we sold Weed Chains. We sold 40 x 5 single solids and 40 x 5 dual solids. That is a tractor tire, taken off a tractor in my presence. It is a 40 x 5 Firestone Cushion tire. Part of that is one of the original chains that was sold by us to fit that size tire in 1922. The side chains are the original side chains that we sold. The cross chains have been worn out and replaced many times. Those are not the original cross

chains. On this particular tractor this chain was sold to fit, they have since taken off the tire and replaced it with a seven inch tire instead of a five, consequently lengthened the cross links. Plaintiff's Exhibit 14—Weed Tire Chain 40 x 5 for Tractor Tire. Plaintiff's Exhibit 15, 40 x 5 Tractor Tire. Both offered and received in evidence, as identified by the witness.

Q. Mr. Steeves, can you state whether or not Weed Chains are generally and commonly used on tractors in the vicinity of Somerville, Mass.

Mr. McMahon: The Government interposes an objection to that question because it calls for the conclusion of the witness, the witness is not qualified to answer, it assumes [fol. 151] facts to be true which have not been shown by the evidence, it is immaterial to the issues in this case, it is incompetent, not the best evidence and usurps the power of the jury.

Mr. Swindler: Your Honor, we have a witness here that is in the business of selling these. It must be part of his business to ascertain the demands of his trade—his customers. He testified he has sold these chains. He must be qualified, I think, to testify to the general common use of these chains for tractors.

The Court: I think he may answer. Objection overruled.

Mr. McMahon: Note an exception.

A. Yes.

Cross-examination.

By Mr. McMahon:

Q. I will ask you to examine Plaintiff's Exhibits 1 to 11 and state whether or not those exhibits contain a chain of the same size, width and length as the chain which you have identified as Plaintiff's Exhibit 14.

A. You mean you want me to measure them? I have no way of knowing. I don't know what the length is of any one of the chains.

Q. No, will you determine for us what it is?

A. That what is—these here—any of them?

Q. Yes, see if there is any in there like that one.

Mr. Swindler: Your Honor, owing to the breadth of that [fol. 152] question the witness can't comply with the request of counsel's question.

The Court: Sustained.

Q. Do your duties take you about the country in your official capacity in connection with your occupation with this auto concern?

A. No, sir.

Mr. Swindler: I object to that as improper cross examination.

The Court: Do you press your objection?

Mr. Swindler: I do.

The Court: It has been answered. Do you move to strike it out?

Mr. Swindler: I move to strike the answer of the witness as an answer to improper cross examination.

The Court: Motion granted.

Mr. McMahon: Note an exception.

I have never seen Plaintiff's Exhibit 14, in actual use on that particular tire identified as Plaintiff's Exhibit 15. During the taxable period that particular chain was sold by us as 40 x 5 single solid chains. That is all its description. We purchased it from Ashton De Vere, Inc., Plaintiff's Exhibit 14, that particular chain is referred to as a Truck Chain, 40 x 5.

R. L. Morton, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Long:

During July, 1922 to June, 1924, inclusive, I was Chief [fol. 153] Engineer for the Fox Rotary Snow Broom Company, Philadelphia, Pa., who manufactured and sold snow brooms. Those brooms consisted of a steel superstructure on which was mounted a motor with a reducing gear and a rotary broom, disposed at a 45 degree angle on lifting arms so that it could be raised and lowered, and mounted on a five-ton motor truck. We made the snow broom and in some cases made the truck. In other cases we supplied trucks of other manufacture that were specified by the purchasers of snow brooms. The other trucks were of White, Pierce Arrow, Mack, Brockway, Kelly-Springfield and the Hurlburt was of our own make. The tires on the

trucks we made were 36 x 12 and 40 x 12. They were the same size as the other trucks mentioned. We did business in Michigan, Illinois, Pennsylvania, New Jersey and New York. Exhibit 16, Fox Rotary Snow Broom Print, as identified by witness offered and admitted in evidence. That machine was used in New York City. It is mounted on a 5 ton White chassis. Our snow machine was superimposed on that five-ton White chassis. We purchased Weed Chains for use on our various machines during the taxable period, that is on the tires of the trucks of our various machines. That is a circular of the Fox Company, showing its product mounted on different makes of trucks and chasses that were sold by us during the taxable period. Weed Chains were a part of their specifications. Plaintiff's Exhibit 17, Catalogue of Fox Rotary Snow Brooms mounted on different makes of trucks and chasses, as identified by the witness, offered and admitted in evidence. Page 5 of [fol. 154] Exhibit 17 shows a Fox Snow Broom mounted on a five-ton Mack Truck. It is a four-wheel drive truck. Those various machines referred to in the Exhibit were sold during the taxable period by our company and Weed Chains were used on each and all of them. That is a circular of the Fox Rotary Snow Broom devoted to municipalities, street railways issued in 1923. Exhibit 18, as identified by the witness, offered and admitted in evidence. Page 3 of Plaintiff's Exhibit 18, shows a Fox Rotary Snow Broom mounted on a five-ton Hurlburt Motor Truck of our own manufacture. The middle picture shows a Fox Rotary Snow Broom mounted on a five-ton Mack Truck. The second page shows a section of the New York fleet of Fox Rotary Sweepers. Page one shows a Fox Rotary Snow Broom in the Borough of Queens, New York City, mounted on a Pierce-Arrow truck. The fleet are mounted on Pierce Arrow trucks. All of those machines were manufactured and sold by our company. Weed Chains were used on such machines during the taxable period. The sizes of chains used on those trucks were 36 x 12 solid tires, either dual or single and 40 x 12. During the taxable period I have attached Weed Chains to these motor plows and am well acquainted with their use on this kind of apparatus. I have attached Weed Chains to automobiles and trucks. The Weed Chains used on this equipment worked well, were satisfactory and I had no complaint to make. We bought the chains from a jobber of the American Chain Company

located in Harrisburg, Pa. We bought them to fit the cer-
[fol. 155] tain size tires that were on the truck at the particular time, namely, 36 x 12 and 40 x 12.

Cross-examination.

By Mr. McMahon:

I actually saw chains probably on all of the machines described in Exhibits 16, 17, and 18 several times. I mean for you to understand that I actually saw Weed Chains used on each of the machines sold by our company during the taxable periods with my own eyes. I saw them in New York last winter, the machines are still in existence.

I saw the chains used during the winters of 1922 and 1923 in all of the states. In New York I saw them in New York City and Buffalo, all over the city, not all over at the same time. It is just possible that chains might have been used quite often when I didn't see them. It is possible that chains may have been used that I didn't know anything about. I saw them in use at intervals, not every day, just when the machines were in operation. They cannot operate without them. The chasses of the machines in Plaintiff's Exhibits 16, 17 and 18 are standard Truck Chasses and the wheels are standard truck chassis wheels. We included a pair of chains as original equipment on each of the machines we sold during the taxable period. That was our custom.

Redirect examination.

By Mr. Long:

Our company made the Hurlburt Truck, super-imposed the snow sweeper on top of it and sold it to cities for use in
[fol. 156] snow removal from the streets, also the other trucks used had our snow broom superimposed on them. They were used for removing snow from roads and highways in some cases. They could be utilized for that purpose where the snow was not too deep. The machines were not used for transportation of persons or property, they were used for removing snow from streets, highways and roads. With an ordinary truck chassis, to superimpose our broom, it simply meant the location of three cross members in the frame of the sweeping broom, which were lo-

cated across the frame of the motor truck, two of them back of the grip and one in front of the radiator. There were two motors used, the motor in the truck did the propelling and the auxiliary motor provided in the broom structure turned the broom, which performed the mechanical function. A motor truck chassis consists of a motor-engine-transmission, front and rear axles, four wheels, frame, springs, dash, hood, radiator and the necessary spring bolts and spring shackles and step irons, mud guards and so forth to assemble a complete motor truck. The chassis does not carry a bed for freight. The truck complete does. We removed the bed and we just bought the chassis without the bed.

MAURICE WALTER, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Long:

I am Chief Engineer of the Walter Motor Truck Company, Atlantic Beach, Long Island, who manufacture Wa- [fol. 157] ter Snow Fighters. It is not a broom, but a snow fighter. It is a machine to push snow. They have been manufacturing it since 1921. Prior to that time they manufactured motor trucks and tractor trucks for hauling and carrying purposes. The Walter Snow Fighter in appearance resembles a motor truck using a conventional type wheels, but the design and structure of the chassis is such that it drives on four wheels with a positive system of driving. It has a powerful motor, a special range of transmission ratios to give maximum speed and traction for pushing under all conditions. In other words it is built for its pushing ability rather than carrying ability. The distinct snow fighter model was not originally used for carrying passengers or freight. During the taxable period we did business in approximately five or six states, including Canada. There was one machine sent to Canada and we did business in New York, New Jersey, Michigan, Ohio and Pennsylvania and other states at the time. During the taxable period we purchased Weed Chains and used them in demonstrating the Snow Fighter. It was not our policy to sell the machines with Weed Chains. I don't recall any

request to equip the machines with them. We would advise the purchasers to acquire the Weed Type of chain. It was necessary to equip the machines with chains to use them in all but the very lightest snows, as traction on all four wheels was necessary in order to use the unit effectively. We manufactured the complete Snow Fighter. We did not use standard chasses because they would not de-
[fol. 158] velop the proper pushing power for the conditions of service. They did not have the proper horsepower or gear reduction. Exhibit 19-A is a photograph of the first snow fighter taken in March, 1921. During the taxable periods we made machines similar to that. Exhibit 19-B is another view of the Walter Snow Fighter demonstrated in 1921. It has tire chains, but not the Weed type. Exhibit 19-C is another view of the same snow fighter. It has tire chains but not Weed. Exhibit 19-D is one of a similar type machines delivered to the Fifth Avenue Coach Company several months later. They regularly used tire chains but I am not prepared to say if they were of Weed Manufacture or not. Exhibit 19-E shows Walter Snow Fighters working in New York State, equipped with Weed Chains on both rear wheels. That is in the country near Cortlandt, New York. Exhibit 19-F shows two Walter Snow Fighters purchased by Fifth Avenue Coach Company with Weed tire chains on front and rear. Exhibit 19-G is a Walter Snow Fighter sold to the Toronto Bus Commission in 1921. I don't know if those are Weed Chains. Exhibit 19-H is a Walter Snow Fighter with motor plow, sold to Rensselaer County, New York, equipped with Weed Chains. Exhibit 19-I is another view of the Walter Snow Fighter for the Fifth Avenue Coach Company, New York City. Those are Weed Chains. Plaintiff's Exhibit 19, consisting of photographs described as 19-A to 19-I, inclusive, as identified by the witness, was offered to merely show the machine and admitted in evidence, I have used Weed Chains on automobiles. On the
[fol. 159] Snow Fighters with solid tires they generally used 40 x 7 size, sometimes the 40 x 6 dual and with the pneumatic's size 40 x 8, all Weed Chains. Used them on all four wheels. At that time we were buying from the Prudden Hardware Company or other hardware jobbers of New York, but they delivered to Long Island. The front tires were 40 x 7 solids, the rear tires were 40 x 6 duals, some machines had the same front and rear tires.

Cross-examination.

By Mr. McMahon:

We did not sell chains as part of the original equipment of Weed Manufacture. In some cases these chains wore out rather rapidly from the point of view of time, not mileage. They were not used every day during the taxable periods, but about 90 per cent of the time used for snow service the chains would be on. The snow service period depends—The Fifth Avenue Coach Company used the machines day and night for several months. We first made the motor truck snow plow in 1921. The automobile was in existence at that time. I have seen chains on automobiles at that time and prior to that time. The chains we purchased for demonstration purposes usually had a mysterious series of numbers. We looked at the bag and measured them and if we knew they would fit a certain size tire they would be all right. As I recall, the bags always had the size like 40 x 8 or 40 x 7 and if solid tires were specified, whether for single or dual. I suppose they also had on them American Chain Company, Weed Type. Sometimes [fol. 160] they had heavy duty on them or something like that. Plaintiff's Exhibit 6 is a similar bag to those we purchased during the taxable periods. I cannot tell specifically if the wording was Weed Truck Chains, Weed traction chains, or whatever it might be.

Redirect examination.

By Mr. Long:

Q. Were these Weed chains used on your machines?

Mr. McMahon: The defendant objects to the question because it calls for the conclusion of the witness, the witness is not qualified to answer, it assumes facts to be true which have not been shown by the evidence, it is immaterial to the issues in this case, it is incompetent and not the best evidence and usurps the power of the jury.

The Court: The same ruling, you may have it.

Mr. McMahon: Note an exception.

The Court: Exception noted.

A. They were generally used on Walter Snow Fighters. When we bought the chains, we would order a specific

size chain, such as 40 x 7 single or 40 x 6 dual, whatever size we required without specifying anything else. I have used chains on my automobile and operated the Snow Fighter with Weed chains on the tires.

Q. Did the chains on the Snow Fighter that you operated perform the identical function as the chains on your automobile?

[fol. 161] Mr. McMahon: The defendant objects to the question because it calls for the conclusion of the witness, the witness is not qualified to answer. It assumes facts to be true which have not been shown by the evidence, it is immaterial to the issues in this case, it is incompetent and not the best evidence and usurps the power of the jury.

The Court: Admitted.

Mr. McMahon: Note our exception.

A. They did.

These chains that we bought fitted the tire and were satisfactory.

Recross-examination.

By Mr. McMahon:

By function I mean the working of an article, in this case of chains, the function of the chain is to give traction between the rubber and road surface, and my answer is limited to traction between the rubber and road surface.

Redirect examination.

By Mr. Long.

There was one motor on the Snow Fighter. That motor performed the function of turning the wheels to develop the pushing of the plow.

Recross-examination.

By Mr. McMahon:

The motor used in that machine was more powerful than the standard truck motor. It was of one hundred horsepower.

[fol. 162] Redirect examination.

By Mr. Long:

The tires on the Snow Fighter were of the Standard Commercial size of truck tires. The one difference as compared to ordinary truck practice was that big tires in diameter and cross section were used on the front wheels as well as on the rear wheels.

Recross-examination.

By Mr. McMahon:

The tires used on the Snow Fighter were standard truck tires, solid and later pneumatic. The first pneumatic I believe was in 1924 in June or July. We did not have pneumatic tires in use during the taxable periods on our trucks.

William A. Palmer, a witness, whose deposition was taken on behalf of plaintiff, at Minneapolis, Minnesota, on the 17th day of August, 1931, and presented at the trial, having been first duly sworn, testified as follows:

Direct examination.

Read by Mr. Long:

I am general foreman of maintenance, District 9, of the State of Minnesota, for the State Highway Commission of Minnesota, with headquarters at Hopkins, Minnesota. I started with the State Highway Commission in August 1923 as general foreman and continued in that position to date. During August 1923 to June, 1924, inclusive, we used tire chains, "Weed Chains" made by the American [fol. 163] Chain Company for tractors and trucks and some cars, but our car chains were nothing to speak of. We obtained these chains from the Highway Supply Shop, at Midway, State Fair Grounds. We just issued orders for them and they were delivered to us by our pick-up man from the St. Paul shop. We used the chains in the winter time on snow, they were put on—in that period, most of our trucks ran pretty strong to solid tires; outside of Quad trucks, they would use pneumatic tires with pneumatic

tire chains, but the other chains were used on tractors or trucks that were in the work—put on the tires. We ordered the chains by sizes. In ordering I would order the 40 x 6 or the 40 x 7 dual and that could be used on possibly the Pierce-Arrow trucks, Liberty trucks and also on Fordson tractors and No. 1020 tractors, the International. We used them. We made no distinction as to whether they were to be used on trucks or tractors, just used them as we saw fit. We very seldom used chains except in snow work and very little snow work was done without chains. That is removing snow from highways, after construction of the highway, when it is blocked with snow. From August 1923, to June, 1924, inclusive, I would not want to make a positive statement as to the time the roads were blocked with snow. We usually figure on snow in November and through March, three or four months. We used chains during that time on tractors. I would have to check our records to know how much of that equipment we used each day of the month, the amount of snow would depend entirely on the [fol. 164] storms. From November until March is our snow period and we might work ten straight days and we might not work only two days, it would depend on the snow fall. There was considerable snow during those years. These tire chains were interchangeable for use on automobiles and trucks or tractors, if the proper sizes were used and the same condition of labor, without any change in the chains.

Cross-examination.

Read by Mr. McMahon:

During the taxable periods we were using four tractors in my district, 20 trucks and four passenger cars of the Commission's. We pull road equipment with trucks as well as tractors in the snow. We used most chains on tractors during that period because there were only about four of those trucks that we used on snow work. We did not use chains on trucks in mud as a custom, just occasionally we do. We had about an even break between trucks and tractors, except our tractors would run steadier and go through a set of chains in twenty-four hours. Heft of the chains doesn't seem to make any difference, they just simply wear down on concrete roads, hard surfaced

roads and gravel. The 40 x 6 or 40 x 7, duals, would be used on a tractor or a truck, solid tires both on trucks and tractors. We could not use them on the passenger cars. The chains came to us in sacks, I expect the sacks are marked, it states the size on the sacks and whether they were duals. I do not think the heavy chains are marked themselves. The chains were picked up on my order and [fol. 165] placed in stock. American Chain Company chains were purchased by the Highway Department at St. Paul. We just ordered so many chains of a certain size and they bought them where they pleased. Occasionally, if we were short, we would pick them up locally in Minneapolis.

Redirect examination.

Read by Mr. Long:

I was pretty sure Weed Chains were made by the American Chain Company. My department is No. 9. There are 16 departments or districts in the State of Minnesota. I have been in other departments as an observer. The work carried on in the other departments was similar to mine. The use of chains was similar in other departments to what it was in No. 9.

Recross-examination.

Read by Mr. McMahon:

My answers are confined purely to my knowledge of the state of conditions in the State of Minnesota.

GEORGE SCHLISSEL, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Swindler:

During the period July 1922 to June, 1924, inclusive, I was chief mechanic in the volunteer fire department, West Shore Fire Department, West Haven, Connecticut. During [fol. 166] that period we had a Ford Howe Pumper which we purchased from the Ford Howe Fire Department Equip-

ment Company of Fort Anderson, Indiana. That equipment was superimposed on a Ford one-ton truck. The size of the tires were 30 x 3½ in front and 32 x 4½ in the rear. We used Weed Chains on all four wheels, 30 x 3½ and 32 x 4½, during that period. The truck came to us fully equipped as fire apparatus. I, at no time used the chains from the rear wheels of this truck on an automobile. After we retired the fire engine, I used chains from the front wheels on my Ford Sedan, having 30 x 3½ wheels. They worked as well on my Ford as on the fire apparatus. They fit as well on one as the other. I do not know where the chains used on the fire apparatus were purchased. I saw Weed Chains used on the hook and ladder in the center of town. They used a single link chain on a solid tire. That equipment is located on Second Avenue near the center of West Haven. That was a single link chain fastened on a solid wheel. It was a Weed Chain. Plaintiff's Exhibit 20, photograph of Ford Howe Pumper, West Shore Fire Department, as identified by witness, offered and admitted in evidence. We used chains on that equipment from the fall of snow until the dirt roads dried out in the spring.

Cross-examination.

By Mr. McMahon:

The cross links on Plaintiff's Exhibit 1 are connected by a side link, while single link chains are nothing but the cross links and are fastened on hooks and bolts inside the [fol. 167] flange of the wheels. They can be demounted. When the wheel turns the single link chain does not slide around the tire, it is permanently fastened. The single link chain is from fourteen to sixteen inches long. They were probably using four chains on one wheel.

Frank M. Hutchinson, a witness, whose deposition was taken on behalf of plaintiff, at Minneapolis, Minnesota, on the 17th day of August, 1931, and presented at the trial, having been first duly sworn, testified as follows:

Direct examination.

Read by Mr. Long:

I am Purchasing Agent for the Motor Power Equipment Company, at Ford Road & River Boulevard, St. Paul, Min-

nesota. As such I purchased tire chains from jobbers in St. Poul and Minneapolis to use on rubber-tired wheels of Fordson tractors. The business of my company was equipment to go with Fordson Tractors If we needed chains for our rubber-tired tractor wheels, we called up various jobbers, such as Minneapolis Iron Store or Nicols, Dean & Gregg, who were jobbers for Weed Chains and asked for chains for tractors They said they carried no chains for tractors, they carried truck chains; if you have got the size they could supply us with those, so we measured the wheels and ordered four or five sizes of truck chains which we used on these tractors Those sizes were 40 x 5 single; 40 x 5 dual; 40 x 7 single and 40 x 10 single. They were the chains listed as truck chains and we bought them for use on rubber [fol. 168] tired tractors, Fordson tractors. We carried on that business in that way from the fall of 1924 until the last part of 1927 or the first part of 1928. I could not be sure when Ford discontinued supplying that tractor. We sold equipment in Minnesota, North and South Dakota and twenty-four counties in Western Wisconsin. Chains commonly used on trucks could be used on tractors without any substantial change, we used the same chains on both trucks and tractors interchangeably.

Cross-examination.

Read by Mr. McMahon:

The 40 x 7 single chain I spoke of will not fit an automobile, none of them would fit Ford trucks, they would fit larger trucks, but I cannot tell you the makes of those. We used the 40 x 5 duals on Coleman trucks, four-wheel drive trucks, which is the only truck we used ourselves. We sold these chains to others who had larger trucks, but we actually delivered them only on that make of truck. We demonstrated Coleman trucks, we used chains to demonstrate them. I actually saw the others in use on other trucks; they were truck chains; they were not tractor chains, that is what we bought for the tractors. From the fall of 1924 until 1928, we used Weed Chains just on Fordson tractors, afterwards we used them on the Allis-Chalmers tractors, that is after 1928 we discontinued the Fordson and sold Allis-Chalmers tractors. The Coleman truck is made at Littleton, Colorado, a suburb of Denver.

It has a good distribution. It is sold for highway main-
[fol. 169] tenance work; it is a four-wheel drive truck. The army had them—a lot of them during the war. It is not sold in general use though. There were no chains available when we were in this business for tractors; that is why we had to order the truck chains. That is why we were using straight truck chains. We had to measure up our tractors and order a size that would fit out of the truck chain models available. In other words these distributors and jobbers did not have anything they listed as a tractor chain at that time and we acquired these chains that were put out for trucks and put them on our tractors. We paid no attention to the duty requirements of our tractors as compared to the truck, they worked satisfactorily on the tractors.

Ebbe Carlson, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Swindler:

During July, 1922 to June, 1924, inclusive, I was Secretary and Chauffeur for the Fairfield Volunteer Fire Department, Fairfield, Conn. During that period we had two Locomobiles—chemical and hose wagon—one Ford hose and pump. The size of the tires on the Locomobile equipment were 35 x 5 and on the Ford equipment 30 x 3½ front and 32 x 4½ in the rear. That vehicle was a Ford truck chassis. It was purchased from Woodhouse in New York City. It was made by the Watrous Pump Company, at
[fol. 170] least that was the name on it. It was purchased new and came to us fully equipped. We used Weed chains on all pieces of fire apparatus during that period. We bought some of the chains used on the Locomobile and some were given to us. We usually went out and tried to get them as there was very little money to buy things with, being a volunteer fire department organized about 1897 and much of the equipment donated. A pair of chains that was used on one of the Locomobiles was donated by a party who had been using them on a Cadillac limousine.

Q. Did these chains work as well on the fire vehicles as they did on the Locomobile?

The Court: Just a minute. It doesn't appear that he knew how they worked on the Cadillac.

Q. I withdraw the question. Did the chains fit as well on the Locomobile fire vehicle as on the Cadillac?

A. They were a perfect fit.

The Court: That is the same thing. Do you press your objection, Mr. McMahon?

Mr. McMahon: No, I don't.

Q. The question was: Did the chains fit as well on the Locomobile fire apparatus as it did on the Cadillac?

A. They were. They were a perfect fit on the Locomobile.

We made no change or alteration to make them fit. When we bought chains, we always asked for "Weed." We did not ask for a chain primarily designed for fire apparatus. Weed chains were used on all of our vehicles.

[fol. 171] Cross-examination.

By Mr. McMahon:

By fully equipped fire apparatus, I mean it came through as regular fire equipment—the pump and all attached right on it, ladders, hose and all. I don't remember if it has chains with it. I bought a pair right after, but whether there was a pair with the truck or not, I couldn't tell you.

Redirect examination.

By Mr. Swindler:

We used chains on three wheels of the Ford from the inception of bad weather until the roads dried out in the spring. I mean by that, we used chains on the two rear wheels and right hand front wheel. We used them on one front wheel when out on dirt roads to pull them out of a rut. We did not customarily use the chains on one of the front wheels. We got the same result by using them on just one front wheel.

Louis D. Christy, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Swindler:

During July, 1922 to June, 1924, inclusive, I was chief of the fire department, Nichols, Connecticut and we had one Model T Ford. That was mounted upon a Ford automobile chassis. The sizes of tires were 30 x 3 front and 30 x 3½ on the rear. We used Weed Chains on that Ford during that [fol. 172] period on the rear wheels only. That is a picture of the Ford T Model apparatus with the La France equipment mounted on it. It was taken in 1919. Plaintiff's Exhibit 21—Photograph of Fire Apparatus of Nichols, Conn. Fire Department as identified by witness offered and admitted in evidence. I have a wheel and tire taken from that equipment in court. That is the rear wheel taken off the Ford Chemical apparatus. The size of tire is 30 x 3½. I took that wheel off personally. I did not personally buy chains for the vehicle.

Mr. Swindler: I offer this as Plaintiff's Exhibit 22.

Mr. McMahon: The defendant objects to the offer of the Model T Ford wheel as immaterial to the issues in this case.

Mr. Swindler: Your Honor, the witness has testified to the use of this fire equipment and the use of the chains on it, and——

The Court: Do you claim that this type of fire department equipment is non-taxable?

Mr. Swindler: We do.

The Court: Under regulation or statute?

Mr. Swindler: I might say under regulation and statute.

The Court: Overrule the objection.

Mr. McMahon: Note an exception.

V

[fol. 173] Charles G. Keller, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Swindler:

During July, 1922 to June, 1924, inclusive, I was chief of the Stepney Fire Department Stepney, Conn. We had a

Ford automobile chassis with a chemical tank on it. We did not buy that equipment, it was given to us. The body was taken off from an old horse drawn chemical truck and mounted on the chassis. The size of tires was 30 x 3½ and we used Weed Chains on that equipment during that period. During that period I observed equipment of nearby fire departments. There was Monroe, Connecticut, where I saw a Reo Speed Wagon. I think the tires on it were 34 x 4½. I saw Easton, Connecticut, department. They had Oldsmobile equipment. The size of that tire was 35 x 5. Those are pictures of the Stepney fire truck at that time, two different groups taken from different positions. That represents the vehicle I discussed. Plaintiff's Exhibits 23 A and 23 B, photographs of Stepney, Conn. fire apparatus offered and admitted in evidence. I own a Chevrolet automobile with a 30 x 3½ tire. This is the rear tire from the rear wheel. I took it from my automobile. It is size 30 x 3½. Plaintiff's Exhibit 24, Automobile tire, marked for identification. During this period I saw Long Hill fire department's equipment. I have seen Haddertown's equipment. They had a Ford, tire sizes 30 x 3½ both front and rear. All the equipment I saw used Weed Chains. I ordered the driver to buy the tire chains at Stepney.

[fol. 174] Cross examination.

By Mr. McMahon:

The fire department equipment at Stepney was mounted on a Ford automobile chassis. The Monroe, Conn. equipment was mounted on a Reo truck chassis. The Easton, Conn. equipment was mounted on an Oldsmobile truck chassis. Haddertown equipment was mounted on a Ford automobile chassis.

Louis D. Christy, a witness recalled by plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Swindler:

I have in Court the chains that were used on Plaintiff's Exhibit. That is a chain taken off the rear wheel of the

Ford Chemical at Nichols. I can't be sure if this chain or that one was on that wheel, but the wheel was taken off from that vehicle. Plaintiff's Exhibit 25, Chain from Plaintiff's Exhibit 22, as identified by witness offered and admitted in evidence. Plaintiff's Exhibit 24 withdrawn.

ROYAL B. DEAN, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Swindler:

During July, 1922 to June, 1924, inclusive, I was salesman for B. A. Dean & Son and Dean-Dillingham Company, two [fol. 175] correlated concerns, Auburn, New York, engaged in the business of farm products and farm implements. I sold Weed Chains during that period. I sold them for use on tractors during that period. 40 x 5 single solids and 40 x 5 dual solids and 40 x 7 single solids and 40 x 7 dual solids. It was not primarily my business to know the demand in my territory in New York for chains for tractors, but I was fairly well acquainted with it. It was the general practice to use the chains on tractors in my territory during this period. I saw chains used on fire fighting equipment during this period at Auburn, N. Y. The size of the tires on those vehicles were 36 x 4 single solids, 36 x 7 single solids, 36 x 8 single solids. I have seen Weed chains used on road graders or snow plows at Watertown, New York, Syracuse, New York and Auburn, New York.

Cross-examination.

By Mr. McMahon:

I did not sell tractors. I didn't sell all of the chains used in my trade territory during the taxable period. Various concerns sold chains of different makes. I did not deal in special chains for tractors. The size of the chains was on the bag. I designated the chains as Weed. They came to us in bags labelled similar to Plaintiff's Exhibit 6.

WILLIAM HEANEY, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Swindler:

During July, 1922 to June, 1924, inclusive, my business was selling tractors for the Martins Company, Syracuse, [fol. 176] New York. During that time I sold Weed chains for use on road graders, snow plows and tractors. The sizes sold for use on tractors, were fronts, 30 x 3½ and 30 x 3, single solids and rears 40 x 3½ single solids, 40 x 7 dual solids, 40 x 5 single solids, 40 x 10, dual solids, 40 x 8 pneumatics and 40 x 10 pneumatics. I have seen chains used on the front wheels of tractors. The sizes 30 x 3 and 30 x 3½ were the sizes used on front wheels. I saw industrial tractors using chains at the Solvay Process, Solvay, New York. Those are small tractors used around industrial plants, railroad yards and railroad station terminals for carrying baggage. The size of tire on the road grader I saw using chains was 40 x 5 dual solids. I saw it in operation in the City of Syracuse.

Cross-examination.

By Mr. McMahon:

I sold the Fordson tractor. A 40 x 10 dual chain would fit the wheel of the tractors I sold. Most of those tractors were equipped with Whitehead & Kale wheels. The Fordson tractors I sold took 30 x 3, 30 x 3½ for front wheels and 40 x 10 duals and 40 x 10 singles for rear, both solids. I can only say from the marking on the bag if Plaintiff's Exhibit 10 will fit or not the Whitehead & Kale wheels on the tractors I sold. A Whitehead and Kale wheel requires a chain shorter on the inside, both chains and side members are the same, I mean during the taxable period.

Redirect examination.

By Mr. Swindler:

I don't know all of the wheels manufactured by Whitehead and Kale during the taxable period. The Whitehead [fol. 177] and Kale make all types of wheels. They have

extensions that go on to a rubber tired wheel, which is a steel flange, which doesn't interfere with a chain as far as the general operation of a rubber tired wheel is concerned. Those I saw during the taxable period used the standard size chain.

Recross-examination.

By Mr. McMahon:

I have never seen a Whitehead & Kale wheel that required a chain longer on the outside than on the inside.

CHARLES A. KELLOGG, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Swindler:

During July, 1922 to June, 1924, inclusive, I was Chief of the Long Hill Fire Department, Long Hill, Conn. We had a Reo chassis with a Peter Purse equipment, which I operated myself, using Weed Chains on the tires of that vehicle, which came to us completely made up as a piece of fire apparatus. I used Weed Chains on two rear wheels only, size 33 x 5. I ordered the chains from the American Hardware Company, Bridgeport, Conn., and the fire company paid for them.

Cross-examination.

By Mr. McMahon:

The Reo chassis was a small truck, a truck chassis.

[fol. 178] A. L. LUNDQUIST, a witness, whose deposition was taken on behalf of plaintiff, at Minneapolis, Minnesota on the 17th day of August, 1931 and presented at the trial, having been first duly sworn, testified as follows:

Direct examination.

Read by Mr. Long:

During July, 1922 to June, 1924, inclusive, I was in the employ of the Minnesota State Highway Commission with headquarters at St. Paul, Minnesota. I have been in the employ of this commission since 1919 as parts manager and buyer of parts and accessories for trucks and automobiles and tractors. During that period I purchased Weed chains made by the American Chain Company from jobbers in the Twin Cities for use in snow-plowing and pulling graders in the spring of the year in the mud. I bought such chains for tractors and trucks—no special chains for tractors. I did not buy chains specially designed for tractors. Chains were specially designated for tractors and other chains for trucks. Chains might have been specially designated for tractors and other chains for trucks; we did not specify for tractors or trucks; we used them interchangeably for trucks and tractors. I purchased them by size. The chain sizes we used on trucks and tractors were 36 x 6 pneumatic, 38 x 7 pneumatic, 40 x 8 pneumatic, 42 x 9 pneumatic. We also used 36 x 10 solids, 40 x 5 dual solids, 40 x 6 dual solids. In storing chains we did not keep those for trucks separate from those for tractors. Those chains were sent out to our different districts on requisitions from them. We sent [fol. 179] them to the districts where they were needed. There are sixteen districts in the state. I heard the testimony of William A. Palmer, foreman of District No. 9 and his requisitions for chains as covered by his testimony were typical of the other fifteen districts in the state. His district is typical of the other fifteen districts and the method of doing business in District No. 9 is similar to what it is in the other districts. In the fall of the year we would send out circulars to the different districts as to what their chain requirements are going to be for the year. We totaled these up and bought the chains and shipped them to the districts. We always kept chains in stock so we could furnish the districts with chains as stocks were depleted. Those chains were used principally for snow removal and pulling road drags. If a person representing one of these districts came to my office or place of business and asked for chains for use on trucks I would deliver such chains to him and if a man ordered a set of 40 x 5 dual chains for tractors, I

would take them off the same pile that I would if a man ordered 40 x 5 dual for a truck. These chains were in sacks with the size and name of the company that makes them on the sack, the American Chain Company and the size of the chain in inches. There was no marking showing which were truck chains and which were tractor chains. They ordered by size and we furnished them by size. I had occasion to see the chains used on account of operating snowplows on tractors and trucks out of our central shop. We did not make tests before we sent them out. Tests were [fol. 180] made afterwards on actual conditions and covered both the removal of snow and pulling graders in mud. I have seen chains put on either trucks or tractors without any change being made in the chains as long as the tire size is the same. There were no peculiar characteristics in chains that were to be used on trucks different from those that were to be used on tractors and I could not tell on delivering a pair of tire chains whether they would be used on trucks or tractors. I am speaking of Weed chains made by the American Chain Company during July, 1922 to June, 1924, inclusive. In 1929 we started buying other makes of chains. I would say our purchases amounted to around $10,000.00 a year during those years.

Cross-examination.

Read by Mr. McMahon:

You cannot use a 36 x 6 pneumatic with a 36 x 10 solid. You cannot interchange a 36 x 7 pneumatic with a 40 x 5 dual solid. A 42 x 9 and a 40 x 6 dual are not interchangeable. To my knowledge no chain has ever been made specially for tractors. Tractors and trucks came into common use in 1919 and 1920. The trucks came first and I would say trucks had chains before tractors came into existence. I would say that a tractor chain could be made different on account of the extra cross links in them, but then again those extra cross links are also desirable for truck use. Some times a chain does not have enough cross chains and extra cross chains are put in, especially adapted for tractors and also for trucks and that is for a wide tired truck. What [fol. 181] I mean by that, is extra cross chains, so that the spacing between the chains are not so great. I would say the chain manufacturer takes care of the duty requirements

of a chain for use on a tractor in his different sizes of chains. As to the tensile strength I would not know anything about the duty requirements of a chain marked for use on a truck. As far as chains are concerned, to my knowledge, truck chains and tractors especially—there is a regular truck chain and a heavy duty chain used on tractors or trucks as specified by the buyer. I am speaking particularly from the practical observation and what I saw and I have no intention of conveying the idea that I am at all familiar with what is known to engineering as duty requirements. We have a greater number of trucks than tractors in use in the State Highway Service. I would say about 33½% are tractors and the balance 66½% are trucks. We also have a number of passenger cars which use chains too. During 1922 to 1924, inclusive, we had many of the so-called army trucks, over a 1,000 of them which we received as an allotment from the Federal Government. We used those trucks for pulling graders and snow removal in the winter. They used them constantly, as a matter of fact most of the districts used these trucks right along for grading work and road work. The tractors are not necessarily used mostly on new construction work. They use them for maintaining roads and dragging roads. Today most of the highway equipment is motorized. There are very few horses used on the road. The roads are maintained by tractors and trucks [fol. 182] with the graders and tractors built in one unit now. In 1922 to 1924 I would say that most of the tractors were independent of the grader, the tractor pulled the grader, but now they are built as one unit. In 1922 to 1924 the truck pulled the grader. At that time most of the road building of the state was inaugurated and we used these army trucks very extensively in grading, hauling and everything else. I bought parts and accessories for automobiles, trucks and tractors. We have a central shop at the fairgrounds in St. Paul that we furnish the rest of the districts parts and materials from. During the winter months we have two or three snowplows that operate out of that central shop to keep the state highways around the city open. As far as those two or three snowplows are concerned the central shop is just merely a maintenance unit, otherwise just a distributing point. I would say we used about $10,000.00 worth of chains in one year. That is an estimate on my part and not an actual basis. In other words it is a guess.

Redirect examination.

Read by Mr. Long:

During that period we generally used Fordson and International tractors. The size of chains used in the Fordson and International tractors were 40 x 5 duals. These sizes were also used on the five ton Pierce-Arrow and Government Liberty trucks, which used the same size tires.

Recross-examination.

Read by Mr. McMahon:

In other words I could take a chain off of the Pierce-Arrow [fol. 183] or the Liberty trucks and use it on the Fordson tractor. The Fordson tractor came into use, in my judgment, two or three years later than the truck came into use. We had chains in use on trucks prior to the time that we had the Fordson.

WILLIAM A. AHERN, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Day:

I am a plumber and am connected with the Branford Fire Department, Branford, Connecticut as Fire Marshal and Deputy Chief. During July, 1922 to June, 1924, inclusive, I was Fire Marshal. I am familiar with the fire equipment of the Branford Fire Department. During those two years we had a Packard Hersch—that is, a Packard chassis with Hersch fire equipment; a Pierce-Arrow with a Northern equipment and a Pope-Hartford chemical. On the Packard the tires were 36 x 6; on the Pierce-Arrow the tires were 35 x 5 and on the Pope-Hartford the tires were 35 x 4½. Those were pneumatic tires. In the winter during that period we used Weed chains on that apparatus on the rear wheels only. We used them almost constantly and kept them on in the winter. As far as I know these chains operate generally to keep cars from skidding on the road in wet weather.

Cross-examination.

By Mr. McMahon:

The Packard chassis was a truck chassis. The Pierce-Arrow was not a truck chassis. That Pierce-Arrow was [fol. 184] originally owned as a pleasure car by Mrs. Weibel here in New Haven. The Pope-Hartford was mounted on a regular fire chassis that was made by the Pope-Hartford people at that time. It was a regular fire chassis in the nature of a truck chassis. Some are regular fire trucks and some are made into fire trucks.

DONALD B. HOWARD, a witness, whose deposition was taken on behalf of plaintiff at Minneapolis, Minnesota on the 17th day of August, 1931 and presented at the trial, having been first duly sworn, testified as follows:

Direct examination.

Read by Mr. Long:

I live in St. Paul, Minnesota and am a manufacturer. The names of my companies are the Andrews Heating Company, the Andrews Manufacturing Company, and the Glide Road Machinery Company. At the present time I am vice-president and general manager of these companies but during July, 1922 to June, 1924, inclusive, I was assistant purchasing agent. During the taxable period I know of the use of Weed chains manufactured and sold by the American Chain Company on our tractors and on glide road machines with solid and pneumatic tires and on our road drags which carry pneumatic and solid tires. We used chains quite regularly on those implements. We got those chains from the distributors of the American Chain Company and usually sent a set of chains with a tractor, not always, but [fol. 185] usually. Before the price was completed, the chains were included. During that period our shipments were very scattered especially in the Glide Road Machine Company, and I would say that it covered on the whole from twenty to twenty-five states. The purpose of using these chains in connection with the tractors and other implements we manufacture was very essential on account

of the variety of road conditions, and the unusual weight of the equipment, so that it was included to prevent skidding and give additional tractive power to the machines. I saw those Weed chains used on automobiles or trucks. I saw them used on trucks by Federal, state, or municipal agencies. I saw them in a number of states. I have seen them when we traveled—here in Minnesota more largely than anywhere else. As a usual thing a set of chains went with the machine, not always though. The time I have been engaged in manufacturing tractors and other implements varies for the different equipment, but I would say the manufacture of tractors has been extended since 1910 and that of road graders and road drags since 1921. I might qualify that by saying I was not with the concern prior to 1920 but I think they manufactured tractors as far back as 1905 and 1906. I am familiar with the use of chains on trucks and automobiles. The tire chains referred to can be used on tractors and road equipment as well as on trucks and automobiles. The sizes of these tire chains are 40 x 9 pneumatic, 40 x 8 pneumatic, 38 x 7 pneumatic, 40 x 5 solid and 40 x 6 duals. That covers our [fol. 186] purchases. We used those chains back and forth occasionally so they were interchangeable. At times when we needed to we would take the chains that we had from one machine and put them on another or occasionally on our pleasure cars. By pleasure cars I mean automobiles for the salesmen and in cases like that. We used them interchangeably on trucks and automobiles and tractors, not as a general thing but in emergencies. It did not require any particular change in the chain to make it adaptable to one or the other use where the sizes were correct. The machines we built were used in building and repairing public roads and were almost always moved or hauled by tractors. Some were handled by horses and some with light machines. Those tire chains were also used on our road machinery to some extent independent of tractors. Howard's Exhibit 1 is a picture of a McCormick-Deering tractor hitched to our road grader which was used to grade the Minnesota State Fairgrounds in September, 1922. The photograph does not show any chains on the tires at that time but I have seen chains put on those wheels. They were not used in this case because they were scraping down the race track but we regularly buy chains on that equip-

ment. Plaintiff's Exhibit 26 (formerly Howard's Exhibit 1) photograph of McCormick-Deering tractor hitched to Andrews road grader as identified by witness, offered and admitted in evidence. Howard's Exhibit 2 is a photograph of a tractor containing American Chain Company chains connected to our road drag or wheel road drag on which we put chains in muddy weather. Plaintiff's Exhibit 27 [fol. 187] (formerly Howard's Exhibit 2) photograph of tractors with Weed tire chains attached to Andrews road drag as identified by the witness, offered and admitted in evidence. Howard's Exhibit 3 is a picture of a McCormick-Deering tractor connected to one of our wheel road drags. Plaintiff's Exhibit 28 (formerly Howard's Exhibit 3) photograph of McCormick-Deering tractor connected with Andrews wheel road drag as identified by witness, offered and admitted in evidence. That photograph does not show any tire chains on the tires. I have seen tire chains placed on that tractor or the equipment. It is the same machine as Howard's Exhibit 1. Howard's Exhibit 5 is a photograph of a tractor containing American Chain Company chains, pulling one of our road drags in front of our factory at Minneapolis. Plaintiff's Exhibit 29 (formerly Howard's Exhibit 5) a photograph of Andrews road drag with Weed tire chains attached as identified by the witness, offered and admitted in evidence. Howard's Exhibit 6 is a McCormick-Deering tractor pulling our road drag and being tried out with American Chain Company chains on the rear wheels of the tractor for additional traction power. Plaintiff's Exhibit 30 (formerly Howard's Exhibit 6) photograph of McCormick-Deering tractor fitted with Weed tire chains as identified by witness, offered and admitted in evidence. Howard's Exhibit 7 is an advertising circular issued by our subsidiary, the Andrews Manufacturing Company of Minneapolis, Minnesota, showing in the picture at the top of page one of the folder one of our own [fol. 188] make of tractors pulling an Andrews dump wagon. American Chain Company chains are on the tires. Howard's Exhibit 8 is an electrotype from a photograph of our own make of tractor containing American Chain Company chains on the rear wheels, connected to one of our Andrews self-loading dump wagons. Howard's Exhibit 9 is an electrotype from a photograph of one of our own make of tractors containing American Chain Company

chains on the rear wheels and drawing Andrews self-loading and unloading snow wagon unloading snow into a truck in the City of Minneapolis, the truck wheels of which are fitted with the American Chain Company chains. The truck also has chains as well as the tractors that are made by the American Chain Company. We put Weed chains on the trucks as well as on the other equipment. Howard's Exhibit 10 is a reproduction of a photograph of our own make of tractor having solid steel rims fitted with Weed tire chains drawing an Andrews self-loading snow wagon near our factory in Minneapolis. Howard's Exhibit 11 is a reproduction from a photograph of a McCormick-Deering tractor drawing an Andrews self-loading snow wagon in front of our office in Minneapolis. The tractor of which is fitted with American Chain Company chains on the rear wheels for tractive power. That implement is for loading and hauling snow from the streets. Howard's Exhibit 12 is a complete folder or circular advertising a number of our machines but the name of Andrews Manufacturing Company is a subsidiary of the Andrews Heating Company owning all of the stock of the Andrews Manufacturing [fol. 189] Company. The purpose of the folder was to show the use of machines in action for the purposes for which they were intended and in an abstract way show the use of tire chains on such vehicles although it did not have in mind demonstrating the use of the tire chains. They were used for the utility need of the chains themselves at that time. Plaintiff's Exhibit 31 (Howard's Exhibits 8 to 12) circular of the Andrews Manufacturing Company containing electrotype of self-loading and unloading wagons with tractors, etc., as identified by witness, offered and admitted in evidence.

Cross-examination.

Read by Mr. McMahon:

A 32 x 9 Pneumatic American Chain Company chain will not fit a Ford car, a Chevrolet car nor a Buick car. I don't know if a 40 x 8 will fit the same kind of cars. We use standard pneumatic tires on the road drag. At this time they are balloons and I think in 1922 to 1924 they were standard high pressure tires. A 42 x 9 will fit some trucks. A 48 x 8 will fit a Quad truck. It will not fit a Ford truck

nor a Chevrolet. I don't know if a 40 x 5 solid will fit a semi-balloon pneumatic standard tire on a Buick, Cadillac or Lincoln. There is a difference in the size and weight, etc., of the American Chain Company chains of the numbers I have been talking about. The difference is in the weight, lengths and measurements and I think there is a variation in the links, that is in the weight of the links made of steel wire. I don't think a 40 x 5 chain that I have sold for use on a solid tire is heavier than a 40 x 9 that I sold for use [fol. 190] on a pneumatic. They are different things. The difference I have in mind is principally one of measurement, I cannot say about the diameter of the wire used in those two particular sizes. The question of requirements between a Quad truck and Ford delivery truck is always a varied thing. The measurement duration is more important than the size or weight of the chain links as to what a man would use would depend a good deal upon what was available and the condition of the roads. I would not say that a chain used on an ordinary Ford passenger automobile would last very long on a five-ton loaded truck. When we bought them for the use we had in mind and picked out the size chains by sizes and the weight usually was proportionate to the size measurements. The numbers that I gave are chains we picked out as being adaptable to our specific types of use. We would go up and fit them from the stock here by these numbers, but not as designated for tires on tractors or automobiles or anything of that kind. We bought just by the numbers themselves. We knew our own uses and knew the type of chain we wanted to fit best for each of these specific uses. I am not a graduate engineer. I know something about the duty requirement of a five-ton Mack truck as relates to chains. I would pick out for a Mack truck pneumatic tires quite a heavy chain. I have never had any experience in the matter of figuring traction or friction with respect to the duty requirements of Mack trucks nor anything to do with the engineering phase of it. In picking out a heavy chain for [fol. 191] a five-ton Mack truck I would do so from practical knowledge, merely basing it on their relation to the sizes with other trucks of five-ton capacity in general. I never put any chains on a Mack truck that I remember but I have placed chains on five-ton trucks of other makes. I could not tell you as to the number of tractors, road building

machines, etc., that we sold to municipalities which were equipped with American Chain Company chains. We have 6,000 machines out—of the glide machinery, and I don't know how many tractors. I could not say. I have no idea of how many of these chains that are used each day or each month or each year on the machines. When I speak of the different chains being used I mean that I have sold the equipment and supplied the chains but beyond that I have no knowledge whatever except the specific instances that I have testified to although I have some knowledge of the use of them in actual service but I have no record from day to day of any quantity—any large proportion of the total machines outstanding. My knowledge is no more limited than any other manufacturers would be in that respect. We have not put in any part of our investigation in the use of chains. When I sold the tractor and supplied the chains the purchaser might have used them for something else although it would not have been possible for them to have used our machines in muddy weather without the chains. I know nothing about the number of chains put out by the American Chain Company during 1922 to 1924, inclusive except as to purchasing them ourselves. I have no knowledge whatever of the relation our total sales bear to their [fol. 192] total sales. It is out of the scope of my field to give you some idea of what the total number of tractors and road machines we manufactured and sold bear to the total number of automobiles manufactured and sold throughout our trade territory or in the United States. I think the use of chains on tractors was quite extensive, that is, I think that over 90% of our machines were equipped with chain supplies. I am not in a position to make any comparison. On tractors, trucks and road machinery the need for chains is more frequent and more general than on automobiles but as regards the respective numbers for the two classes of work and pleasure I am not competent to answer. I have no knowledge of the relative number of tractors in our trade territory as compared to the number of automobiles in use in that territory. I do not think there were more tractors in our trade territory than automobiles, I would guess the automobiles would preponderate and would consider that a pretty safe guess. We don't make any automobiles nor sell chains to automobile dealers but we use some of these chains on our

own cars. I put a pair of these chains that were meant for tractors on a Packard car of my own. That was the smallest pneumatic 38 x 7. I put on two of those chains, just a chain on each rear wheel. I could not say how many of those chains I have put on other cars. We have a habit of changing them once in awhile, occasionally, from some of the trucks over to our pleasure cars but I could not say what size we used, we put on anything that happened to be around that we could make fit. That was not a general [fol. 193] practice with me. I don't know that I made all the sales in those states to municipalities. We have sold highway commissions, road contractors and other contractors, some doing Government work, city work, township work and county road work. During those years I doubt that we sold any chains to highway commissions as that is a recent arrangement to consolidate purchases in the state capitols. In some places we sold through the state heads in the capitols of each of the states and we sell direct to the county and township commissioners. In 1922 to 1924 we sold direct to municipalities in between twenty and twenty-five states. As to the number of municipalities in those states I don't care to make a guess on that without looking up our records. I have seen some of the chains we sold commissions and municipalities in use on the roads when out inspecting but not the entire number of chains sold.

Redirect examination.

Read by Mr. Long:

Tire chains may be detached from automobile or truck tires and attached to tires of the same size on tractors, road equipment vehicles without any change or adaptation.

Recross-examination.

Read by Mr. McMahon:

I gave a little thought to the duty requirements of tractors, trucks and automobiles. It is a question of the excessability of the chain. In merchandising we take chains off of automobiles and put them on our tractors and road [fol. 194] machines. The chains go by number and it is possible to use some of the sizes that were used on pleasure

automobiles on certain sizes of our trucks and road machinery wheels or rims. I don't know what the chain engineer's comparisons are as to duty requirements but we go by size, numbers and measurements only and not by duty requirements. The duty requirements vary under so many different conditions that the chain might be too light for the use on a tractor or use on a pleasure car of some kind of wheels and on others it might be entirely sufficient.

Redirect examination.

Read by Mr. Long:

We have interchanged chains as a matter of expediency more than practice.

WILLIAM J. ANTHONY, a witness called by plaintiff being first duly sworn, testified as follows:

Direct examination.

By Mr. Day:

During the period July, 1922 to June, 1924, inclusive, I was Assistant Fire Chief in the Town of Stratford, Connecticut. On July 2, 1922, we purchased an A. C. Mack Fire Fighting Apparatus. That is a 3½ ton job put on to fighting equipment, equipped with solid tires and we also had a Commerce chemical wagon. In January, 1923, we changed the Commerce and got a 1½ ton Federal with equipment of fire fighting apparatus with four pneumatic [fol. 195] tires. The Mack truck had solid tires and the Commerce had pneumatic and the Federal had pneumatic. The Mack had 34 x 5 fronts and 34 x 5 dual rear. The Commerce had 34 x 5 pneumatic all around and the Federal had 33 x 4 pneumatic all around. We used Weed chains on all three pieces of apparatus. We used them on all four wheels of the Mack and on the four wheels of the Commerce. We put the chains on when the weather became bad in October or November, just as soon as the first sleet and ice came, and left them on for the continuance of the bad weather, possibly until April.

Cross-examination.

By Mr. McMahon:

The A. C. Mack 3½ ton job is a truck and the Commerce chemical wagon is also a truck and the 1½ ton Federal job is a truck, that is all truck chasses.

WILLIAM F. COTTER, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Swindler:

On July 1, 1923, I was in charge of the Automotive Department in the Pittsburgh District comprising the State of Ohio, West Virginia, nearly all of Michigan, and the Western part of New York State in the employ of the American Chain Company. After July 1, 1923, I was transferred to the New York District as district sales [fol. 196] manager in New York State territory comprising the entire state and Northern New Jersey, as well as the Metropolitan District of New York. The Automotive Division took in mostly the entire Weed Tire Chain Line and merchandising and selling. During July, 1922 to June, 1924, inclusive, I traveled very consistently and observed the use of Weed chains on fire apparatus, tractors, road maintenance machines such as graders, snow plows and similar vehicles. I saw Weed chains used on such vehicles and in the latter part of 1923 I saw them used on a road sprinkler, I believe it was on a Mack truck, in the Buffalo area outside of Buffalo, New York. It was my duty to be familiar with, and I was familiar with, all the chains manufactured by the American Chain Company during that period. The chains which the company manufactured and sold for automobiles and trucks were of the same design generally as those which they manufactured and sold for tractors, road maintenance machines, and fire apparatus. My statement is that the design of chains for all of the vehicles named was substantially the same. I was familiar with the Whitehead and Kale wheels during that period. They manufacture a wheel with what they call an exten-

sion rim for the mounting on an auxiliary tire when considered necessary. The wheel was designed for several reasons. Principally where an owner had occasion to propel the tractor over certain roads and not caring to tear up the road with the cleats and metal or steel wheels, this tire would raise the tire just high enough so as not to be destructive over any ground travelled on. The only change in the specifications for Weed chains for that par- [fol. 197] ticular wheel involved inserting 6 or 7 extra links on the inside of the chain, simply to lengthen it out and make it a little longer. We do not classify the sides of the chain. Ordinarily we would put the tire chains on with the end connecting hooks in the rear and run over and connect here. This would go on the inside of the wheel. In other words, we would loop the chain over the tire with the end connecting hooks here. This would be the inside of the wheel. On account of the additional circumference here, the chain requires about 7 additional links on the inside chain or rim chain as it is known in the trade. I saw some of these wheels in use. Not many were manufactured. It was a special and our sales were not of any great consequence compared with the regular standard chain. Whitehead and Kale also made what is known as the standard wheel and this was known as a special unusual size.

DANIEL M. HERTZFIELD, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Swindler:

During July, 1922, to June, 1924, I was a salesman for the American Chain Company covering the entire State of New York, and it was necessary in the performance of my duty to travel over the entire State. At that time I observed Weed tire chains used on fire apparatus and tractors. In the City of New York I sold during that period [fol. 198] and still am selling to the Fire Department of the City of New York. I installed chains myself on rear wheels for them for testing purposes and I saw the fire trucks leave their stations and I have made various tests

regarding installation of chains for the fire marshal to satisfy him that my chains would fit correctly on account of the emergency when they might have to use them. I recall selling Weed chains for such fire apparatus of sizes 36 x 4 single solid, 36 x 5 single solid, 38 x 4 single solid, and 40 x 6 dual solid. Those are the standard sizes that the New York City Fire Department used at that time. We sold them other sizes such as 32 x 4, 33 x 4, the oversized tires 33 x 4½, 33 x 5, 35 x 5, and 37 x 5, mostly in pneumatic sizes for emergency wagons, also fire apparatus as far as I know and for all different uses that they have for those particular trucks. During this period I sold chains for use on trucks to a great many Ford dealers in the State of New York. I saw Weed chains used on the front wheels of tractors at Watertown, New York, and I had occasion to see, in fact I was called by the dealer to go out and make a sale and install the chains on the front and rear of this tractor which I saw in operation. The sizes of those chains were 30 x 3½ in front and 40 x 10 dual in the rear. That was a Whitehead and Kale job. In the course of my duties I was required to know all of the chains manufactured and sold and be familiar with them during the taxable period. During July, 1922 and June, 1924, inclusive, the Company did not manufacture and sell a chain specially designed for tractors, it was a regular truck chain with the exception of the Whitehead and Kale [fol. 199] wheels of which there were a very few. Most of them were standard wheels that they used as an attachment to raise that wheel so that it would not sink in the mud and which standard truck chains 40 x 10 dual would fit. Six or eight lengths were added to one side of the side chain of the Weed chain to make it suitable for that particular Whitehead and Kale wheel. My Company did not manufacture a chain especially designed and sold for use on trucks, we made only the standard truck chains that I know of in all the years I have been with the Company, as well as during the taxable period. Those truck chains are used on both trucks and tractors. My Company did not manufacture and sell chains especially designed for use on fire equipment, we used our standard truck chain. The standard automobile chain manufactured and sold by my Company was also used for fire equipment uses. My Company did not manufacture a chain especially designed

and sold for use on self-propelling motor driven machines such as excavating shovels, ditch diggers, graders, road scrappers, street sweepers and street sprinklers. They have had one design of chain ever since I have been with them. Weed chains were manufactured and sold generally according to the size of the tires irrespective of the vehicles on which the chains were to be used.

Cross-examination.

By Mr. McMahon:

The fire apparatus I speak of consisted of various types, such as fire trucks, etc. Plaintiff's Exhibits 8 to 11, inclu-
[fol. 200] sive, are the types of truck chains that were used by the fire departments that I testified about a little while ago, only the side chains were different than these. You have not got the side members for use. Plaintiff's Exhibits 4, 5, 6, and 7 contained in a bag marked "truck chains" are not necessarily for a lighter tire but are for pneumatic tires. There is a difference between a pneumatic tire chain and a solid tire chain. Plaintiff's Exhibits 1 to 7 are for pneumatic tires and 4 to 7 are for pneumatic truck tires.

JOHN J. HINE, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Day:

During July, 1922, to June, 1924, inclusive, I was Secretary to the Board of Fire Commissioners, Bridgeport, Connecticut, and one of my duties was the purchase of equipment for the fire department. During that period I purchased Weed chains for the fire department. We bought sizes 36 x 3½ solid, 36 x 4 solid, 36 x 6 solid, 38 x 7 solid, 36 x 5 solid, 38 x 5 solid, 38 x 3½ dual, 60 x 4 solid, 35 x 5 solid, 40 x 5 solid, 38 x 6 solid, 40 x 6 solid, 38 x 4 solid, 48 x 6 solid, 60 x 3½ solid, 42 x 5 solid, 34 x 5 pneumatic, 35 x 4½ pneumatic, 31 x 4 pneumatic, 32 x 4 pneumatic. Those chains were used during bad weather in the winter time on the front and rear wheels. The chains were at-

tached in the house the minute we got in slush or ice so as [fol. 201] to have them ready in case the bell hit. We purchased those chains through various jobbers, The American Hardware Store, Bridgeport, Connecticut, Post & Lester, and the Blue Ribbon Garage, in quantities. We bought the Weed chain and specified a specific size according to the size of our tires.

Cross-examination.

By Mr. McMahon:

Fire equipment used in Bridgeport consists of truck chasses and chemical apparatus, fire trucks, pumping engines, hose wagons, aerial trucks and chemicals, and after we purchased the chains they were turned over to our mechanical department for distribution to the various pieces of apparatus to which they belonged. We bought these different sizes of truck chains.

ARTHUR C. STORZ, a witness whose deposition was taken on behalf of plaintiff, at Omaha, Nebraska, on the 20th day of August, 1931, and presented at the trial, having been first duly sworn, testified as follows:

Direct examination.

Read by Mr. Long:

During July, 1922, to June, 1924, inclusive, I was Vice-President and General Manager of the Storz Western Auto Supply Company, Automobile Supplies Jobbers Wholesale, at Omaha, Nebraska. That Company was known as a wholesale automobile supplies jobbing house. The name [fol. 202] of Weed chains was used during that period to designate tire chains manufactured and sold by the American Chain Company. We started in business in 1911 and continued in that business to that time. We purchased a great many Weed chains every year during the taxable period from the American Chain Company, Bridgeport, Connecticut. I know of the use of the Weed chains on tractors during that period. They were quite generally used by contractors, by the State Highway Department, by County Road Supervisors, and Municipalities on their

street cleaning equipment, fire equipment, and police equipment. We sold Weed chains in Western Iowa, all of Nebraska, and parts of South Dakota, Kansas and Missouri. I saw chains used on the State Highway, in the Counties, and in the City of Omaha and City of Lincoln in my territory. I sold Weed chains that were put to such use on tractors. The more popular tractor sizes were 40 x 5, 40 x 6, 40 x 5 dual, 40 x 7, 40 x 8, 40 x 10, and 38 x 5 dual in that territory. Weed chains were in very general usage on tractors as a traction device between October and March of every year because we have a lot of snow out here. They were used for traction, non-skid devices. There was snow, and in those days we had a lot of mud roads in wet weather. They were absolutely necessary. I saw some of those Weed chains used on fire apparatus in Omaha and Lincoln that I know of. My conception of fire apparatus would be their equipment that they used in putting out fires. Fire engines and cars and water tower, etc. I sold Weed chains for such [fol. 203] use. There was quite a variation in size and fire equipment. The more popular stuff seemed to run about 38 x 5, 38 x 6, 38 x 7, some 40 x 10 and some 38 x 5 dual. I have seen Weed chains used on automobiles, trucks, and motor cycles for Federal, State, or Municipal governmental purposes. I have seen them used by the Post Office Department here, by the Police Department, and by the Fire Department in Omaha, and other cities of Nebraska, as well as on road equipment throughout the State, or in this territory. Weed chains to be used on automobiles and trucks have no peculiar characteristics or design which are not identical to Weed chains for use on tractors, fire apparatus and road equipment, the general design is all the same. There is a difference in weight. As the size increases the chains are of course heavier. Weed chains may be detached from automobiles or truck tires and attached to tires of the same size on tractors, fire apparatus, or road equipment. I cannot say that I actually saw any detached and put on, but the same size would be applicable. The size of Weed chains designated in my previous answer was sold by the American Chain Company to our Company.

Q. You are familiar with the claims that are made in these various suits are you not, and have been advised in regard to what these suits are for, being for the recovery or refund of taxes that have been paid?

Mr. McMahon: The Government objects to that question for the reason that it calls for an answer predicated upon hearsay testimony.

[fol. 204] Mr. Long: There is nothing to show how he got his information. He said he was familiar. Whether he got it from the pleadings or how—he said he had the information.

The Court: I will overrule the objection.

Mr. McMahon: Note an exception.

The Court: Exception.

A. Yes, sir.

Q. Were the Weed chains manufactured and sold by the American Chain Company, on which the taxes in these suits were paid, interchangeable for use on automobiles, trucks, tractors, fire apparatus and road equipment?

Mr. McMahon: The Government interposes an objection to that question for the reason that it calls for a conclusion of the witness; the witness has not shown himself qualified to answer; it usurps the power of the jury; it usurps the power of the Court, and no proper foundation has been laid. We press the objection as stated.

The Court: Overruled.

Mr. McMahon: Note an exception.

The Court: Exception.

A. Yes, sir.

During the years 1922, 1923 and 1924, we paid the American Chain Company from $70,000.00 to $110,000.00 a year, principally for tire chains.

Q. Of this amount, what per cent in value of the Weed [fol. 205] chains was used on tractors, fire apparatus and road equipment in your territory?

Mr. McMahon: The Government interposes an objection to that question for the reason that it is calling for a conclusion of the witness; no proper foundation has been laid; the witness has not shown himself qualified to answer, and it is immaterial to the issue in this case. We press the objection as stated.

The Court: Overruled.

Mr. McMahon: Note an exception.

The Court: Exception.

A. About fifteen to twenty per cent. in value.

Cross-examination.

Read by Mr. McMahon:

I sold a 40 x 5 chain which is quite a popular size for Fordson and International tractors that can be used on any vehicle that has a 40 x 5 tire, either hard or soft tire, principally hard tires in those cases. The 40 x 10 chain is of both constructions. There was a dual construction and then there was a tire 40 x 10 used on the Fordson tractor and International and some of the old trucks we had during the period after the war period. I think they were principally Libertys. You cannot put a 40 x 5 chain on a tire that takes 40 x 10 chains. They are not interchangeable with 40 x 10, but with another size. You can put a 40 x 5 chain on a wheel that will take a 40 x 5 tire. You can take a 40 x 5 tire chain and put it on a 38 x 6 tire. I think I told [fol. 206] you we had 38 x 6, 38 x 7, and 38 x 5 dual. A 40 x 5 will fit a 38 x 6 or 38 x 7, those or interchangeable. A 40 x 5 chain is used by a 38 x 6 tire when we might have 38 x 6 chains, for instance we use- to sell the storehouse in Lincoln in charge of road equipment, a number of different sizes and if they ran out of one particular size they would use another size that was interchangeable. This interchangeable proposition is more or less general. We did it here in Omaha ourselves when we ran out of a certain size, we substituted another size or sold the other size and I actually saw those people use them. I couldn't give you the name of any people in particular, only I know there was a general usage. You cannot take a 40 x 10 chain and use that on a 38 x 6 tire, that would not adapt itself very well. It could be used on a 40 x 8 and I would say a 40 x 8 could be used on a 38 x 6 as a practical general proposition. We did so use them. The people we sold them to did, and I have seen them use them. I have seen them in Douglas County, Nebraska, our local county, and fire equipment was used by them that way. I know of those two in particular that I actually have seen. I could not say as to the number of chains used that way by those two people. There were more than one pair of chains. There was a considerable number. We took care of their equipment in bad weather. I never constructed nor designed any tire chains. I don't know what you mean, and cannot tell you the exact measurements, but I can tell you the general principle of the traction

was that the chain was laid on the ground and therefore gave traction for the tires that run on top of it. I presume [fol. 207] these tire chain companies have engineers, for the reason that all manufacturers have engineers to build the best products that they know how. The tire chain that is used on the ordinary Ford pleasure car would not be interchangeable for use on a tractor. It is too small. That one is not interchangeable with very many sizes. The reason that it is not adapted for use on a tractor is that it is too small and too light. All chains, as the size went up, were increased in weight and construction, and heavier material. I did not file any of the claims filed in these suits. I did not pay any taxes to the United States or to the Collector of Internal Revenue for the American Chain Company. I do not know how much taxes were paid. I do not know how many sets of chains, taxes were paid on. Generally the duty requirement of a chain used on a fire truck is to give traction during bad weather on slippery roads. It is merely for traction purposes. I cannot tell you how many foot pounds of traction a fire truck requires in chain construction, they use the same chains that the other would. That is all I know. There was no special chain for the fire department. The advent of the automobile truck was first in point of time to the advent of the tractor. They used those chains for traction, but I could not tell you how many years before. I do not know the tensile strength requirements of a chain used on a tractor as compared to a chain used on an automobile truck, but the tire chain is the same. Some sizes were interchageable as I previously stated, you could take a 40 x 5 and fit it on a 38 x 6 or a 38 x 7 generally where the [fol. 208] circumference plus the diameter would reach approximately the same figure. A 40 x 10 chain was not made for use on a Buick automobile. There were not many Buicks that had them that size. I do not know what duty requirements are, I cannot give you the twist stress of a chain, size stress, and stress, applied power of motor and extent of load. I don't know them and am not familiar with those things. I think I sold tire chains to the Post Office Department, but I don't know how many. They usually made their purchase under contract bids, and we did not land very many of them. We didn't sell very many of them. Occasionally, we were the lowest bidder and got the contract, but in emergency cases they used to come to the store

when they ran out of chains at supply depot here and put them on. By equally adapted I mean interchangeable. They serve the same purpose as a traction device, the design is the same, the construction was generally the same, the weight varied by size. Practically they would be equally adapted if the weight varied. The division is so fine they have probably 8, 10, or 15 weights all the way through the line, and the division from one to the other is so small that I couldn't tell you exactly. The specific size of a chain for use on an ordinary fire truck varies according to the equipment. The more popular ones were 38 x 7, 38 x 6, 38 x 5 dual, and 40 x 10. We have a lot of fire engines in this town. They have water towers, hook and ladder trucks, and chiefs' cars, and so on. The hook and ladder is neither a fire engine nor truck. It is a fire apparatus I guess. I cannot give you the total number of [fol. 209] chains sold in the United States for use on fire engines. I don't know how many fire engines in my trade territory. Every town and hamlet has one at least, and the larger cities have more of them depending on the size of the city. We have a lot of tractors in our trade territory. We have a lot of automobiles in our trade territory, more of them than there are tractors. There are more automobiles than there are tractors, but they are not in usage any more, if they want to run them both in the same kind of weather. You cannot run a tractor in as wet weather as you can an automobile without chains. I don't know how many tractors there are in the United States as compared to the number of automobile trucks. I don't know how many tractors there are in my own trade territory as compared to the number of automobile trucks. The advent of the automobile was first or prior to the advent of the truck. I don't know the number of years. The first practical automobile was turned out around 1900. There were several, of course, before that. There never was a tire chain specifically made for a tractor. I never heard of one as a special tractor chain. As a matter of fact they applied the chain in existence at the time of the advent of the tractor to use on the tractor.

Redirect examination.

Read by Mr. Long:

In using the term equally adapted I mean for use on tractors as well as automobiles. In other words you could use them on the one as well as you could on the other.

[fol. 210] Recross-examination.

Read by Mr. McMahon:

It was not necessary for the tire size to be the same. Of course, you cannot take a smaller one and put it on a larger one, but you can take a larger one and put it on a smaller one. I never patented, secured letters patent, nor perfected the design of a tire chain, or a truck chain, or a tractor chain.

Harold W. Falls, a witness, whose deposition was taken on behalf of plaintiff at Kansas City, Missouri, on the 31st day of August, 1931, and presented at the trial, having been first duly sworn, testified as follows:

Direct examination.

Read by Mr. Long:

During the period July, 1922 to June, 1924, inclusive, I was a buyer for the Richards and Conover Hardware Company. During that period we sold or used tire chains made by the American Chain Company designated as "Weed chains". Our regular trade territory is Kansas, and the Western half of Missouri, that we call the Kansas City trade territory, and the State of Oklahoma. We purchased the Weed chains that we sold in that territory from the American Chain Company of Bridgeport, Connecticut. During that period we sold Weed chains for tractor use. During the months of November and December of those years, I saw such chains used each year, and sold Weed chains for use on tractors to tractor companies, that is, dis- [fol. 211] tributing companies for the Fordson tractors. One is the Industrial Machinery Company of Kansas City, Missouri, which is a local distributor for Fordson tractors and tractor equipment machinery. We sold to various

Ford dealers who sold Fordson tractors in connection with their car business. Fordson tractors, regularly equipped with solid tires, would take a 40 x 5 dual. There were a few cases where they were pneumatic equipped, and the tire sizes ranged from 38 x 7 to 42 x 9. We have sold such sizes, sell them every year. Chains were used generally on tractors throughout the year. Under certain circumstances, it is impossible to move a tractor and do work with them without chains. In the majority of cases in the Fall season, especially during heavy snows, sleet, and ice that is true. During those periods a tractor could not operate without chains. I saw Weed chains used on fire apparatus in Kansas City, Missouri, Fire Department at fire headquarters, 11th and Central. I sold a great many Weed chains for use on fire apparatus, which were absolutely so used. Some of the sizes of chains sold for use on fire apparatus were 36 x 6 singles, 34 x 4.5 singles. By that I mean single solids, a single solid tire is just a single tire as the name would imply. Dual solids are two of the single tires mounted on one steel rim on one wheel giving more service traction. We had different sizes or shapes of Weed chains for these different tires. I saw Weed chains used on automobiles and trucks for Federal, State, or Municipal Governmental purposes in our territory, but I could not definitely state about motorcycles. I mean Post Office Depart-
[fol. 212] ment trucks and trucks of that kind. I saw tire chains on Post Office trucks, but I can't say that I have seen Post Office automobiles, small trucks, if that is what you mean, Yes. I saw them on Municipal Fire Department, Park Board, and State Cleaning Department vehicles. I have seen chains on the cars of the Missouri State Highway Commission in Missouri. I would say that we sold Weed chains for that use. I couldn't say to what extent. For the Municipal Governmnet we have sold a lot of them. To the Kansas City Municipal Government. I sold to the Highway Commission. I don't know to what extent during this period. I cannot answer that question because of the fact that the Missouri State Highway Commission is comparatively a new addition to the Missouri Government. I don't know that it functioned at that time. Jackson County Highway Commission bought chains for use on their implements in the construction and repair of highways. I have been engaged in buying and selling Weed chains since

about 1916. During that time I have familiarized myself with the demands of the trade for chains for use on automobiles, tractors and trucks, and daily come in contact with the purchasers of such chains for such use. As to Weed chains, for use on automobiles or trucks having peculiar characteristics, which are not identical with Weed chains for use on tractors, fire apparatus, or road equipment, there is nothing to prevent the use of a pleasure car tire chain on a truck, or a pneumatic truck tire chain on a solid tire, or a single or a dual other than weight of material that is used in the construction of the chain that would limit the life [fol. 213] of it. Weed chains may be detached from automobiles, or truck tires, and used on tires of the same size on tractors, fire apparatus, or road equipment without any change in the chains. I am not familiar with the particular chains involved in this suit, and I am only familiar with the entire line of the American Chain Company. The entire line of the American Chain Company tire chains is adaptable to various uses. Comparable sizes were adapted only for use on automobiles and trucks without any change. Assuming the taxes in these suits were paid on the general line of the American Chain Company, they are interchangeable for use on tractors, fire apparatus, and road equipment. Weed chains were of general use in my territory on tractors, fire apparatus, and road equipment as well as on automobiles and trucks. The same sizes of truck chains were interchangeable with the same sizes of fire apparatus chains because there is no difference between the truck wheel or tire used on pieces of fire apparatus and any other truck, because all it is is a truck. For instance, a 40 x 5 dual tire used on a truck, and it was the standard equipment size at that time, you could remove the tire chain from that truck and put them on a 40 x 5 tractor. Absolutely interchangeable. I would have to guess at the amount of business that we had with the American Chain Company on Weed chains, but I think it would be a conservative figure. Our business with the American Chain Company would approximate $50,000.00 annually with over 50% of that amount being in Weed chains.

[fol. 214] Cross-examination.

Read by Mr. McMahan:

I couldn't answer the question as to how many chains I sold for tractor use during 1922, 1923, or 1924. Can't give you the exact number on that. Those figures are available in the American Chain Company's office in their annual sales analyses, I would say. I am pretty intimately acquainted with tire sale business of our company in this territory in that I do know something about them. I sold these chains myself, personally. That does not mean all sales, but sales that I have in mind, I sold personally. My answer to the question with respect to the sale of chains for use on tractors applies to sales made by [illegible] and other salesmen in my Company. You cannot put a 4 x 4.5 single on a 40 x 5 single without lengthening the side chain. You can put a 40 x 5 single truck on a 40 x 5 tractor comparable sizes. By comparable size I mean sizes that interchange. The size on a truck and a tractor being the same, the truck chain would come right off the truck on to the tractor. For instance, if the truck, as I said, was equipped with 40 x 5 or 38 x 7, those truck chains would go on same sized equipment on a tractor. I mean you can interchange them providing the tire sizes are the same. Today on dry ground you could use a tractor without chains. You use tractors more without chains than you do with chains under a normal season. Chains are used in snow, mud, and ice. The conditions under which they use chains only are snow, mud, ice, sleet, excavating to get trucks out loaded over steep inclines where they can't get traction without, and [fol. 215] railroad yards. Chains are used in that manner the year around. You certainly don't use them for snow and ice today. The use of chains on trucks and automobiles and tractors during the period of snow, ice, and mud as compared to the general use of chains on automobile trucks or tractors throughout the year would depend altogether on the circumstances under which it operated. Normally a motor car will run more miles without chains than it will with chains in a course of a year's operation. That is true as applied to trucks and tractors, but you don't want to overlook the fact that when chains are necessary, that car cannot move without them, and you have been in that same position many times. The use of chains on auto-

mobiles, automobile trucks, tractors, fire apparatus, etc., is comparatively small as compared to the use of those vehicles over a period of a year, but over a period of the Winter season, the answer is, No. I would say the Winter season was from October 1, to the 15th of February. I have seen it in this city where it was necessary to put on tire chains for many days during the Winter season. I have seen it for thirty days here when chains were necessary consecutively because we got in shipment after shipment long distance, two years ago. My memory as to the weather during 1922 to 1924 is not that clear. I think the Capper publications will tell you that tractors operating in this territory are something between eight and eleven thousand. I cannot answer as to the number of fire apparatus in our entire trade territory. I cannot answer how many chains I sold during 1922 to 1924 for use on tractors in our [fol. 216] trade territory because being sold by us, obviously truck sizes are very often under times of emergency for tractor use. As to the advent of the truck or tractor I would say the truck was probably first. The advent of the automobile was first or prior to the advent of the fire engine and fire apparatus, but the fire apparatus came along at the same time the truck equipment came along. I have seen chains used on automobiles prior to the advent of the tractor and the fire apparatus. They used them for the same purpose that they use them for today on automobiles. The Weed chain was designed about 1900. I am not just exactly clear on that subject. It was shortly after the advent of the automobile. The source of my information is that I happen to be pretty well acquainted with some of the men connected with the American Chain Company. The duty requirement of a 30 x 8 single used on an automobile as compared to a duty requirement on a 30 x 8 single used on a tractor is determined by the amount of the load to be pulled, that determines the answer. I know if you will tell me the load, I will tell you whether it will pull it or not, the draw-bar pull. I will tell you whether 30 x 6 will pull it or not. The answer to that is that you take 36 x 7—if you were using 36 x 7, and I had 36 x 8, 38 x 7, 37 x 7, and even up to 40 x 8, or 42 x 9 in an emergency if a contractor would buy that chain and use it on that tire it would function properly because you take up on the side. You are familiar with that, that is only one illustration. Those are

not exceptional. I can start at the top of the American [fol. 217] Chain Company list and go to the bottom and tell you what size will work on another size. A 30 x 3.5, 29 x 4.40, 29 x 4.50, 28 x 4.75, 30 x 4.50, any one size of those chains will fit any of the others. I mean that I can take a 28 x 4.75 and put it on any of those other four sizes and put on that size and that is true through the entire line. I am not an engineer. We have different weights on chains, there are different materials, different weights of materials used in different classifications of chains. I sold those different weights or classifications of chains during the taxable period July, 1922 to June, 1924. Where traction is desired I think a chain is adapted to any kind of vehicle. A freight car doesn't use rubber tires. I specified rubber tires in my answer. Comparable size of chains may be used on any type of vehicle having rubber tires, either solid or pneumatic. I don't know the number of tractors in use in my trade territory from July, 1922 to June, 1924, as compared to the number of automobile and automobile trucks used in my territory, I could not answer, it would be a guess. As a matter of fact, there are more automobiles and automobile trucks by far than there are tractors.

Redirect examination.

Read by Mr. Long:

I cannot answer definitely yes or no as to whether chains being used on a machine used in clearing oil and gas pipes, the machine being neither a truck automobile or tractor. I know of there being such a machine used for that purpose, but don't know whether I sold chains that were used on [fol. 218] that particular type of machine. I won't answer unless I know what I am talking about, and I don't know about that particular item.

WILLIAM D. KIRKPATRICK, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Long:

I am district sales manager of the American Chain Company for the territory of Montana, Wisconsin, North and

South Dakota, Colorado, Missouri, Kansas, Illinois, part of Michigan, part of Kentucky, and Indiana, with headquarters in Chicago, Illinois. During July, 1922, to June, 1924, inclusive, I was district sales manager in the Philadelphia territory, comprising the States of Pennsylvania, Delaware, District of Columbia, Maryland, part of Virginia, part of West Virginia, and the Southern part of New Jersey. During that period I sold or used Weed chains made by the American Chain Company. I have sold Weed chains since 1914, both wholesale and retail, and have been in contact with the retailers and consumers—fleet owners. A fleet owner is one who has a fleet of trucks that he uses in his business. In going around the country it was my business to observe all of the Weed chains that I could in use during the period July, 1922, to June, 1924, inclusive. I have seen Weed chains used on tractors, fire apparatus or road equipment during the taxable period. I saw chains [fol. 219] in use on fire apparatus in the City of Philadelphia, Trenton, New Jersey, Allentown, Pennsylvania, Easton, Pennsylvania, Pittsburgh, Pennsylvania, in fact, in all of the larger centers throughout the entire territory. A Weed chain of suitable size can be used just as well on a tractor as on a truck.

I have seen Weed chains throughout my entire territory. I know of the use of Weed chains on tractors during that period in my territory. I saw them in use on tractors at Chester, Pennsylvania, in and around the coal mines and in the Wilkes-Barre and Scranton Districts. I sold Weed chains that were put to such use. I saw and sold Weed chains for use on industrial trucks around manufacturing plants at the Baldwin Locomotive Works, Eddystone, the Bethlehem Steel Company at Bethlehem. They were small trucks used for conveying material around the industrial plants. The size of tires used on those trucks were 20 x 3½ single solids and I sold chains for that use. The complete sizes of Weed chains that I sold in my territory at that time are shown in the price list of the American Chain Company. I think we used practically all of those sizes in my territory. I sold practically all of the sizes as shown on the list of the American Chain Company price list in effect at that time. There were probably one hundred and some sizes at that time and it is pretty hard to name all of the sizes unless you let me refer to the price

list which was in effect at that time. As applied to tractors, fire apparatus, road equipment and small trucks, I have a list of the sizes in some papers on the bench. If [fol. 220] you would like to have me get it I will be very glad to give you those sizes. The small trucks I testified to were at the Bethlehem Steel Company, South Bethlehem, Pennsylvania, the Baldwin Locomotive Plant at Eddystone, Pennsylvania, in my territory. The orders for those chains passed through my office. The sizes that I sold for use on fire apparatus, trucks and tractors and road equipment were 38 x 7 single pneumatic, 40 x 8 single pneumatic, 33 x 5 single pneumatic, 32 x 4½ single pneumatic, 35 x 5 single pneumatic, 36 x 6 single pneumatic, 36 x 4 single solids, 36 x 4 dual solids, 38 x 4 dual solids, 40 x 5 single solids, 40 x 7 single solids, 36 x 3½ dual solids, 36 x 4½ dual solids, 40 x 6 single solids, 40 x 8 single solids, 38 x 7 single solids, 38 x 3½ dual solids. I was acquainted with the practical use of those various sizes of chains.

Q. You may state whether or not a chain of appropriate size that will fit on an automobile or a truck could be used on a fire apparatus or road equipment equally as well.

Mr. McMahon: The defendant objects to the question because it calls for the conclusion of the witness, the witness is not qualified to answer, it assumes facts to be true which have not been shown by the evidence, it is immaterial to the issues in this case, it is incompetent and not the best evidence and usurps the power of the jury.

The Court: Overruled.

Mr. McMahon: Note an exception.

The Court: Exception.

A. Yes, sir.

[fol. 221] Weed chains for use on automobiles or trucks have no peculiar characteristics which are not identical with Weed chains for use on tractors, fire apparatus or road equipment. Weed chains may be detached from automobiles or truck tires, and used on the tires of the same size on tractors, fire apparatus and road machines without any change in the chains. That is a circular describing Weed chains for International harvesters and trucks. Plaintiff's Exhibit 32—Circular describing chains for International Harvester Company's tractors and trucks offered and admitted in evidence. The Weed chains sold

during the taxable period in my territory for use on fire apparatus and road equipment did not differ in any way from Weed chains sold and used on private automobiles and trucks. They were interchangeable. During the taxable period I knew the design, sizes and purposes of all chains manufactured by the American Chain Company and sold in my territory.

Q. Did the American Chain Company design and did you sell in your district during the taxable period Weed chains for automobiles that differed in any respect from similar chains designed and used for tractors, road machines and fire apparatus?

Mr. McMahon: The defendant objects to the question because the question calls for the conclusion of the witness, the witness is not qualified to answer, it assumes facts to be true which have not been shown by the evidence, it is immaterial to the issues in this case, it is incompetent [fol. 222] and not the best evidence and usurps the power of the jury.

The Court: Overruled.

Mr. McMahon: An exception.

The Court: Exception.

A. No, sir.

Those small trucks I mentioned took a 30 x 3½ tire and a corresponding sized chain. Plaintiff's Exhibit No. 2 is for a tire size 34 x 4.95. As indicated on the bag, the marking is 34 x 4½ and it is bracketed with 34 x 4.95. As the balloon tire came into existence, we took certain sizes that were then made for standard sizes and marked them with the balloon size. The ballon tire did not in fact come into existence until after this taxable period, that is, the latter part of 1924, but that is the correct designation, 34 x 4.95, because that is the size that was in effect during the taxable period. That is a catalogue of tire chains put out by the American Chain Company with the date on it "Issued December 1, 1923." Plaintiff's Exhibit 33—Catalogue of American Chain Company issued December 1, 1923, offered and admitted in evidence.

Cross-examination.

By Mr. McMahon:

I cannot give you the name of any truck using a balloon tire during the taxable period. I cannot give you the name of any tractor using a balloon tire during the taxable period. As a matter of fact there were no tractors using balloon tires to my knowledge. Defendant's Exhibits F, H and I are the price lists I referred to in my direct examina-
[fol. 223] tion with respect to the year 1923. Those would be the lists that would be in effect from the time they were issued on down until other lists were issued during 1923, if any. Defendant's Exhibits J and G are representative of the same lists as F, H and I. Defendant's Exhibit F formerly marked for identification offered and admitted in evidence as a full exhibit. Sales of the chains described in Exhibit J were made during the taxable period. Defendant's Exhibit J formerly marked for identification offered and admitted in evidence as a full exhibit. Defendant's Exhibit G formerly marked for identification offered and admitted in evidence as a full exhibit. During the taxable period it was the policy of my Company to sell through jobbers, that is, direct to jobbers and the sales which I have testified that I made were made for a jobber to assist the jobber in making the sale and the American Chain Company did not sell the chain direct to the customer. I testified on direct examination that I was familiar with the design of chains made by the American Chain Company. Defendant's Exhibit A marked for identification describes or indicates a design of chain made by the American Chain Company during the taxable period. That design is similar to the design of chains described in Plaintiff's Exhibits 1 to 11, inclusive. I sold chains of that design during the taxable period.

Mr. McMahon: The defendant now offers in evidence Defendant's Exhibit A, marked for identification.

[fol. 224] Mr. Long: We object to this because it has no relation to the taxable period and shows on its face that it had expired before the taxable period began; that it is immaterial, irrelevant and does not relate to any issues in this case.

The Court: On the direct examination you asked the question of this witness as to the design and this is offered

in connection with the design. Is not the testimony of the witness that this shows the design used in the taxable period? For that limited purpose it may be admitted.

Defendant's Exhibit A, for identification, laid in evidence as a full exhibit.

Part of Defendant's Exhibit C marked for identification contains a design of chain similar to the Weed chains which I sold during the taxable period but part of it does not. The illustrations show this type of adjuster as part of the chain. The chain itself is of the same design and the adjusters are not a part of the chains described in Plaintiff's Exhibits 1 to 11. I sold chains of that design during the taxable period. I sold adjusters during the taxable period also. Defendant's Exhibit C formerly marked for identification offered to show the design of chain and admitted in evidence as a full exhibit. Defendant's Exhibit E formerly marked for identification is of exactly the same design as formerly. I sold chains of the American Chain Company during the taxable period of that design. It has another adjuster in that design and is not the same as the chains [fol. 225] denoted by Plaintiff's Exhibits 1 to 11, inclusive. I did not sell any of those adjusters during the taxable period with that design of chain. Defendant's Exhibit E formerly marked for identification offered and admitted in evidence as a full exhibit. Defendant's Exhibit B does not contain a design of chain similar or like the designs of chains described by Plaintiff's Exhibits 1 to 11, inclusive. The difference is that this is a diagonal cross chain whereas that is a parallel cross chain. Defendant's Exhibit D formerly marked for identification withdrawn by defendant. I know of my own knowledge that the advent of the internal combustion automobile was first in the point of time as compared to the advent of the internal combustion tractor. I saw chains in use on automobiles prior to the advent of the tractor. The advent of the truck was first in point of time as compared to the advent of the tractor. I saw American Chain Company's chains in use on trucks prior to the advent of the tractor. We had a classification of chains known as "truck chains." We have a classification of chains known as "Weed regulars." During the taxable period we had a classification of chains known as "Weed regular chains." During the taxable period we had a classification of chains known as "Weed regular

cord chains." During the taxable period we did not have a classification of chains known as "Weed regular balloon chains." That is a Weed chain chart, that is, a price list "Revised September 1, 1928." That contains price lists that are similar or like the classifications of chains and price lists which I have been testifying to [fol. 226] here. Defendant's Exhibit K—American Chain Company chart showing price list (photostat copy substituted) offered and admitted in evidence.

Redirect examination.

By Mr. Long:

I heard the testimony of Mr. Morris in which he stated that the chains on exhibit here were manufactured under the Parsons patent, were designed under that patent. What I meant by my answer to Mr. McMahon's questions was that I was testifying as to design only and not anything to do with patents. I don't know anything about the Parsons patent. I was referring in my answer to the design shown attached to the Parsons patent. I mean that picture. The design in Exhibit B is not similar to the chains introduced in evidence. It differs in that the chains on the floor have cross chains running parallel, whereas the chains on that design had the zigzag formation. In other respects the chains on the floor agree to the picture in Exhibit B.

Q. Did the American Chain Company design and manufacture during the taxable period and did you sell in your district during that period Weed chains that were especially designed for use on trucks?

Mr. McMahon: The defendant objects to the question because the question calls for the conclusion of the witness, the witness is not qualified to answer, it assumes facts to be true which have not been shown by the evidence, it is immaterial to the issues in this case, it is incompetent and [fol. 227] not the best evidence and usurps the power of the jury.

Mr. Long: That is a different question, your Honor, from what we asked before in which objection was made. It omits the primary adapter and is confined to the taxable period.

The Court: It may be answered.
Mr. McMahon: Note an exception.

A. No, sir.
Q. Did the American Chain Company design and manufacture during the taxable period and did you sell in your district during that period Weed chains that were especially designed for use on tractors?

Mr. McMahon: The defendant objects to the question because the question calls for the conclusion of the witness, the witness is not qualified to answer, it assumes facts to be true which have not been shown by the evidence, it is immaterial to the issues in this case, it is incompetent and not the best evidence and usurps the power of the jury.
The Court: The same ruling.
Mr. McMahon: Note an exception.

A. No, sir.
Q. Did the American Chain Company design and manufacture during the taxable period and did you sell in your district during that period Weed chains that were especially designed for use on fire apparatus?

[fol. 228] Mr. McMahon: The defendant objects to the question because the question calls for the conclusion of the witness, the witness is not qualified to answer, it assumes facts to be true which have not been shown by the evidence, it is immaterial to the issues in this case, it is incompetent and not the best evidence and usurps the power of the jury.
The Court: The same ruling.
Mr. McMahon: Note an exception.

A. No, sir.
Q. Did the American Chain Company design and manufacture during the taxable period and did you sell in your district during that period Weed chains that were especially designed for use on self-propelling motor driven machines, such as excavating shovels, ditch diggers, graders, road scrapers, street sweepers and street sprinklers?

Mr. McMahon: The defendant objects to the question because the question calls for the conclusion of the witness, the witness is not qualified to answer, it assumes facts to be true which have not been shown by the evidence, it is

immaterial to the issues in this case, it is incompetent and not the best evidence and usurps the power of the jury.

The Court: The same ruling.

Mr. McMahon: Note an exception.

A. No, sir.

[fol. 229] WILLIAM E. WISSLER, a witness, whose deposition was taken on behalf of plaintiff at Chicago, Illinois, on the 1st day of September, 1931, and presented at the trial, having been first duly sworn, testified as follows:

Direct examination.

Read by Mr. Long:

I am in the wholesale automotive business at Des Moines, Iowa, under the name of Herring-Wissler Company. I was engaged in business in Des Moines, Iowa, during July, 1922 to June, 1924, inclusive, under the name of Herring Motor Company. During that period I sold Weed chains made by the American Chain Company. Our Company has never handled any chains but Weed chains. We bought all sizes and styles they had and sold them for all purposes. I am manager of the Company and personally know of the buying and selling of Weed chains. I have been closely enough associated with the use of them to see them used under practically any and all circumstances and conditions. I have seen Weed chains used on tractors, fire apparatus and road equipment, during July, 1922, to June, 1924, generally in the State of Iowa and the City of Des Moines. During those days we were doing business throughout the entire State of Iowa and all parts of the surrounding states. That is where we operated in a wholesale way and had a retail automobile business, retailing Weed chains locally. I think I am familiar with the construction and use of Weed chains. A Weed chain of suitable size can be used just as well on a tractor as on a truck. I know of the use of Weed chains on [fol. 230] tractors during that period in our territory. I don't know that I could say that I saw chains used on a tractor except this, that we sold and did sell at that time chains for use on tractors. I think that during that time our Company was engaged in distributing tractors for the Ford Motor Company or soon after, I have not got the

date in my mind but anyway we had plenty of experience in tractors, that is, Ford tractors. We sold the Ford tractors. Of course, we had had experience with a lot of them, and we sold equipment for tractors. We also sold Weed chains that were used in connection with the tractor wheel, that is, all sizes generally. Tractors took larger sizes, of course, but they were sizes that were also used on trucks. I would say that where chains were needed on tractors that Weed chains were generally used. I would say they were used generally on tractors used on farm land at that time. I saw Weed chains on fire apparatus in the City of Des Moines and sold them for that use. I imagine we sold the fire department in Des Moines because we sold them everything else that they wanted. The size of chains that were sold depended upon the size they needed. We could sell anything that they needed for their apparatus, that is, for their cars and fire apparatus, automobiles and equipment. I saw Weed chains used on automobiles, trucks and motorcycles for Federal, State or Municipal governmental purposes in our territory. I saw them in the City of Des Moines and out in the state and sold Weed chains for such use. Not all tractors have rubber tires, but there were lots of tractors equipped with rubber wheels. Those [fol. 231] could use chains and did use chains. Weed chains for use on automobiles and trucks have no peculiar characteristics which are not identical with Weed chains for use on tractors, fire apparatus or road equipment. Weed chains may be detached from automobiles or truck tires and used on tires of the same size on tractors, fire apparatus or road equipment, without any change in the chains. I think Weed chains were in general use in our territory on tractors, fire apparatus, police and road equipment, as well as on automobiles and trucks. Suitable sizes of Weed chains used generally on automobiles and trucks were interchangeable and used on tractors, fire apparatus, police and road equipment. Weed chains sold during the taxable period in our territory for use on fire apparatus, police and road equipment did not differ in any way from the Weed chains sold and used on private automobiles and trucks. They were interchangeable. Weed chains sold during the taxable period in our territory for use in automobiles or trucks for Federal, State or Municipal government purposes did not differ in any way from the Weed

chains sold and used on private automobiles and trucks. They were interchangeable.

Q. Was there any peculiar characteristics about a Weed chain during that taxable period that prevented it from being sold for general use as a commercial commodity, and which made it primarily adapted only for use as a component part of a privately owned automobile or truck?

Mr. McMahon: The government interposes an objection for the reason that no proper foundation has been laid, the [fol. 232] witness has not shown himself qualified to answer, it calls for the conclusion of the witness, and assumes facts to be true not shown by the evidence and usurps the power of the jury and the court. We press the objection as stated.

The Court: Overruled. Admitted.

Mr. McMahon: Note an exception.

The Witness: Will you read the question please?

(Question read.)

The Witness: No, there was not.

Mr. McMahon: The Government moves to strike out the answer of the witness on the ground that it is usurping the power of the jury and that it states a conclusion and usurps the power of the court.

The Court: Motion denied.

Mr. McMahon: Note an exception.

From July, 1922, to June, 1924, inclusive, all of our business with the American Chain Company at that time was for chains and I would estimate that our business ran annually from fifty to seventy-five thousand dollars a year. We bought direct from the American Chain Company.

Q. What per cent, in dollars value of Weed chains that you sold, was used on tractors, fire apparatus, police and road equipment, in your territory?

Mr. McMahon: The Government interposes an objection to the question for the reason that the witness has not shown himself qualified to answer. It calls for the conclusion of [fol. 233] the witness, and assumes facts to be true which have not been shown by the evidence. The Government presses the objection.

The Court: Overrule the objection.

Mr. McMahon: Note an exception.

A. Under ordinary circumstances, ordinary conditions, in my territory, I estimate that it would be five to ten per cent.

Mr. McMahon: The Government moves to strike the answer of the witness for the reason that it is an estimate or guess and not the best evidence obtainable and is the result of a conclusion on the part of the witness.

The Court: Motion denied.

Mr. McMahon: Note an exception.

During part of that time we had a contract with the Post Office Department to furnish chains for them which was made with the Post Office Department at Washington and we shipped chains wherever they wanted us to ship them. We shipped them all over the middle west. That contract was during the year 1922, and may have extended over into 1923, but I will say during 1922. Our contract was in effect during 1922 and was for a year at a time and I know that we supplied them some chains during 1922.

Q. During the time that that contract was in force after July 1, 1922, what do you say as to the per cent of business that you had during that time on Weed chains to be used on [fol. 234] tractors, fire apparatus, police and road equipment and the Post Office Department?

Mr. McMahon: The Government interposes an objection for the reason that the witness has not shown himself qualified to answer, that it is not the best evidence obtainable, it calls for the conclusion of the witness, and assumes facts to be true not shown by the evidence. The Government presses the objection as stated.

The Court: Overruled.

Mr. McMahon: Note an exception.

The witness: Will you read the question please?

(Question read.)

The Witness: I would have to make the percentage at 20%.

Mr. McMahon: The Government moves to strike the answer of the witness as being an estimate and not evidence or facts.

The Court: Motion denied and an exception.

Mr. McMahon: An exception.

Cross-examination.

Read by Mr. McMahon:

I believe I stated that tire chains used on automobiles and trucks were interchangeable for use on tractors and that they were so used. I don't think I ever sold a tire chain in our territory for use on a tractor having a steel wheel. I think I stated in one of my answers that the chain which could be used on a truck was equally adapted to the same size and style wheel on a tractor providing both had [fol. 235] rubber wheels. I don't know the number of tractors in use in our trade territory during July, 1922 to June, 1924, inclusive, of each year. I cannot give you from memory what the total number of tractors used in our territory during the taxable periods referred to bears to the total number of automobiles and trucks in our trade territory during that period I could give you the facts if I was back home and could look them up. I don't know what size tires Quad trucks have. You cannot put a 30 x 3½ Weed chain on a tire that normally uses a 40 x 5 chain. Tire chains are interchangeable where the tire size requirements are the same. There might be a different size chain used. I am not sure of that, but I will say that the same size chain could be used on both tires. If you have two tires of the same size and specifications your chains will fit them both. Now, if you have two balloon tires of the same size your chain will fit them. If you have two solid tires of the same size they will fit them, and if you've got two other tires of the same size your chain will fit both. I don't know if a chain will fit a solid and a balloon tire, it might, I am not sure of it. I never put one on a balloon tire that I took off a solid tire. I mean by equally adapted that a chain that is built to fit a tire of a certain size is equally adapted to another tire of the same size. That is true if the duty requirements are the same and I don't think it would be true if the duty requirements are not the same. All trucks, tractors, and automobiles do not require the same weight of chain. All trucks, tractors and automobiles do not require chains of the same tensile strengh. During [fol. 236] July, 1922, to June, 1924, inclusive, I sold chains made by the American Chain Company of numerous sizes, weights, and tensile strength. I account for the difference in weights and tensile strength of the chains made by the

American Chain Company during 1922, 1923 and 1924, by the fact that it does not require as heavy a chain on a light car as it would on a truck. I would say that a light car required a chain of a lighter design than is required of a chain for use on a heavy truck. I never had anything to do with the design, or the figuring of duty requirements of chains. The advent of the automobile was first in point of time as compared to the advent of the truck. The advent of the automobile and truck were first in point of time as compared to the advent of the tractor. The automobiles and trucks used chains prior to the advent of the tractor.

Q. As a practical matter of fact proposition, Mr. Wissler, were not the chains formerly used on automobiles and trucks, used on tractors upon the advent of the tractor?

A. I would answer that this way: The same design of chain used on trucks at the time of the advent of the tractor were that of the tractor.

Q. Do you know of your own knowledge, if the chains that were being sold and used on automobiles and trucks, were sold and used on tractors, upon the advent of the tractor?

A. We sold chains for specific use on tractors.

Q. Were they special chains?

A. No.

Q. Were they chains that you had formerly sold, were they chains similar to those you had formerly sold, for use on automobiles and trucks?

A. They were.

[fol. 237] I mean by equally adapted that the chains sold by the American Chain Company during 1922, 1923 and 1924, could be used on tractors as well as on trucks and automobiles, providing the size requirements were the same, and providing the tensile strength and weight requirements were the same. During the years 1922, 1923 and 1924 I actually sold some of the chains I have mentioned having been sold by my Company. I don't know how many I sold. I sold comparatively few as compared to the total number of chains sold by my Company. I don't know how many days out of each month during 1922, 1923 and 1924 that I saw the Post Office Department, the City of Des Moines, the Fire Department, or any other governmental agencies using tire chains. I would say that during 1922, 1923, and 1924 as a general thing tire chains were not used daily in

our trade territory. The use of tire chains was chiefly or principally determined by the weather conditions in our trade territory during those years. The percentage of Weed chains which we sold in our trade territory during July, 1922 to June, 1924, inclusive, for use on tractors having rubber tires, would be small as compared to the use of Weed chains on trucks and automobiles in our trade territory during those months.

Q. Would you say that tire chains are chiefly used on trucks and automobiles as a general thing?

A. Of course, there are infinitely more cars and trucks in use than there are tractors using chains.

Q. Do you know that from observation and your ex [fol. 238] perience in the business in which you have been engaged?

A. I think so.

Q. Well, as a matter of fact Mr Wissler, does not practically every one know there are more chains used on automobiles and trucks than there are on tractors?

A. I think that would be the judgment of any intelligent person, yes, sir.

I don't know how many there were during 1922, 1923 and 1924. I don't know how many motorcycles were used for governmental purposes during those years in our trade territory. We kept the same kind of record on those sales of tire chains made by the American Chain Company during the months of July, 1922, to June, 1924, inclusive, as we did on all others. I didn't know I was asked on direct examination if Weed chains were in general use on tractors in our trade territory or that there was such a question asked. I don't think chains were in general use on steel wheels during 1922, 1923 and 1924. I think tractors used for farming purposes in our trade territory in 1922, 1923 and 1924 having rubber tires, were used without using Weed chains. It is not generally necessary to use chains on tractors having rubber tires during dry weather.

Redirect examination.

Read by Mr. Long:

Road conditions in Iowa in our territory during the taxable period were pretty much "in the mud." There were lots of tractors used and there were lots of tractors used

for road work, and I think they were used for snow removal during certain months of the year during the taxable pe-
[fol. 239] riods. Everybody knows that our roads in Iowa are liable to be tied up at any time after November 1 until the 1st of April. We had road equipment to remove snow and other obstacles from the road during those months, and I think we did during the taxable periods. I think much of that road equipment that was in use at that time operated by tractors.

Recross-examination.

Read by Mr. McMahon:

No one can say without going back and investigating the records that the roads in Iowa generally were tied up everywhere there a month at a time, but I do say that natural weather conditions out there are liable to tie our roads up and it might be for a month at a time. I do not know of any time during 1922, 1923 or 1924 that our Iowa roads were tied up for a month at a time. I do not know of any time now that they were ever tied up more than a day or two during those years. I think that during July, 1922, on through June, 1924, inclusive, we sold truck chains to the Iowa Highway Commission. I would not say positively that we supplied chains for all the governmental trucks which they used in road construction work in our trade territory during those months. I can not tell you how many trucks were allotted Iowa from the fleet of "army trucks." I do not know whether or not any released army trucks were used in building Iowa roads during 1922, 1923, and 1924. I do not know how many tractors were in use in road work during that period. I know of my own knowledge that some were in use but I don't know how many.

[fol. 240] Leona E. Dilger, a witness, whose deposition was taken on behalf of plaintiff, at Chicago, Illinois, on the 1st day of September, 1931, and presented at the trial, having been first duly sworn, testified as follows:

Direct examination.

Read by Mr. Long:

During July, 1922 to June, 1924, inclusive, I handled the correspondence and orders that came in to the Ameri-

can Chain Company headquarters in Chicago for what is known as the Chicago District of the American Chain Company, which comprises Illinois, Indiana, the Western part of Michigan, Wisconsin, Minnesota, North Dakota, South Dakota, part of Kentucky, Nebraska, Missouri, Kansas and Colorado. I believe Oklahoma and Iowa at that time were in our territory. When the orders would come in by mail and by telephone and telegrams I would write up the orders and send them over to the warehouse to be filled and sent out. On such orders I used the name of Weed chains for designating tire chains. My opportunity for seeing the use of Weed chains has been mostly around Chicago. I have seen Weed chains used on tractors, fire apparatus, road equipment and police equipment in and around Chicago and the Northern part of Indiana. The orders would designate the use of the chains, what they were for, they would say trucks or tractors or automobiles, in all instances. I am acquainted with the different sizes of Weed chains. A Weed chain of suitable size can be used just as well on a tractor as on a truck. I participated in selling 40 x 5 single solids and dual solids, 36 x 6 single [fol. 241] solids, 40 x 8 single solids, 38 x 4 dual solids—I understand you want this for truck sizes. I participated in selling all sizes, 30 x 3½ single solids, 36 x 3½ single solids, 36 x 7 single solids, 38 x 7 single solids, 33 x 5, 34x 5 and 35 x 5 single pneumatics, 36 x 5 single pneumatics, 36 x 8 single pneumatics, 36 x 10 single solids, and 40 x 6 dual solids. These sizes were used for road maintenance and road equipment and for the Fire Department of the City of Chicago and other municipalities and tractors. I saw Weed chains used on automobiles, trucks and motorcycles for Federal, State, or Municipal governmental purposes in and around Chicago and we sold Weed chains for such use. The only case in which there was a difference or peculiar characteristics, about Weed chains used on automobiles or trucks and those used on tractors or fire apparatus or police or road equipment, was on W. K. wheels for Fordson tractors where the one side-chain was longer than the other. Those chains were used for Fordson tractors, size 40 x 5. I saw the use of these chains on road equipment, police equipment and fire apparatus, used principally in Chicago for that purpose and on the highways surrounding Chicago during the taxable period.

Cross-examination.

Read by Mr. McMahon:

As regards duty requirements of chains for use in connection with tractors as compared to the duty requirements of chains for use in connection with trucks, all I could say is for traction purposes. I do not know the kind, weight [fol. 242] and tensile strength of a chain required for use in connection with a Fordson tractor and an International Harvester Company tractor, commonly used and about which I have testified. I mean in stating that Weed chains of appropriate sizes were adapted for tractor and truck use, that is, providing the tire sizes are the same and the duty requirements are the same. I saw sizes of the chains which I have described as having been sold by the American Chain Company during 1922, 1923, and 1924, particularly the taxable period, used on automobiles, trucks and hearses, etc. I do not know the number of fire apparatus and different vehicles in the City of Chicago. I do not know the number of municipal vehicles, tractors, automobiles and trucks in use in the City of Chicago. From my observation around the City of Chicago and the outlying territory, I would say there were more trucks and automobiles in constant use than there were tractors, many more than tractors. The sales which I took part in were made to jobbers, distributors, manufacturers, and municipalities in some places. The municipal sales were small in comparison to the jobber, distributor and manufacturer sales. The Fordson tractor required a chain that was about a foot longer on one side than on the other. I have not personally examined the chains I saw on fire engines, tractors and automobiles in and about Chicago. I have seen them. I could tell they were American Chain Company chains by the connecting hooks which are distinguishing marks, and all the chains that I saw were chains made by the American Chain Company. I don't [fol. 243] recall any chains being sold by others than the American Chain Company during the taxable periods. There are other chain manufacturers in the United States. Their chains are sold in and around Chicago now. I don't recall right now as to the taxable period. Automobiles, tractors, and trucks did not require tire chains as a general thing in the Chicago trade territory during each day of the year. It is a fact that automobiles, tractors and trucks re-

quire chains only in bad weather, generally speaking. It depends on road conditions. The 40 x 5 Fordson tractor chain is used on a single or dual equipped tire. In using such chain on a truck tire, such use does not require the 12 inch additional length. That can be cut off in that case. The 32 x 3½ chain cannot be used on a truck normally using a 40 x 5 chain. We sold chains for use in automobiles, tractors, fire apparatus, and other things, different size trucks and different size cars. Under ordinary conditions a five-ton truck would require a heavier chain than the ordinary Ford roadster.

WALTER J. KRETLOW, a witness, whose deposition was taken on behalf of plaintiff, at Chicago, Illinois, on the 2nd day of September, 1931, and presented at the trial, having been first duly sworn, testified as follows:

Direct examination.

Read by Mr. Long:

At the present time I am a salesman for the Manley Man- [fol. 244] ufacturing Company, an associate company of the American Chain Company in Chicago. During July, 1922, to June, 1924, I was warehouse manager for the American Chain Company at Chicago, Illinois. I know the American Chain Company tire chains as Weed tire chains or Weed chains. At that time I had no experience in buying or selling Weed chains, but being an employee of the American Chain Company I used Weed chains. As warehouse manager in Chicago my duties were to see that orders were properly filled, checked and shipped. Oftentimes I got the orders from Miss Dilger or George Kutz, or whoever would be in the office would telephone the orders to us over the telephone, and in a good many cases the jobber that ordered it would send the truck down, sometimes bringing the order with him, and other times telephoning it, and oftentimes individuals would bring the orders handed them by the jobbers, to pick up chains at the warehouse. A great deal of our business was transacted through jobbers. Our business was transacted with the user of chains only in cases where the jobber's stock was depleted and he had given the dealer an order on this particular jobber to pick

up the chains at our warehouse. The orders came to us in writing and orally. We have two ways of receiving our orders. Oftentimes if an order was urgent, as it often was in the case of storms, the orders would be telephoned and a lot of orders were written up at the office and carried by the office. The written orders that came to me from the office did not in very many cases designate the use of these chains. In some cases they were to be written up as regular [fol. 245] Weeds or deluxe regular Weeds, single pneumatic truck, single solids, dual solids. That is the way the order would be designated. Occasionally we would receive an order for some special size, say to fit a Fordson truck equipped with W. K., that is, Whitehead & Kale wheels, a special wheel for Fordson tractors. That chain was 12 to 14 inches longer on one side of the chain than the regular 40 x 5 chain. That wheel was made by Whitehead & Kale at Detroit and was a special size of Fordson tire. There was considerable of that business and oftentimes we would be out of this particular size and would assemble them in the Chicago warehouse. That chain would fit a truck if it had the same size tire. All of the orders, to the best of my recollection, were from jobbers. Oftentimes the individual owner would not only come in with his car, but with his truck, and we would fit the certain size chain to that particular wheel. We dealt in all sizes manufactured by the American Chain Company at that warehouse. The testimony of Miss Dilger as to the numbers of the different sizes agrees with my recollection of sizes used in that period, only a good many more sizes if you include passenger sizes as well as trucks. Passenger sizes were in addition to those that she mentioned. These chains were shipped to us from York, Pa., in barrels. We had bins there marked for different sizes and often carried a stock of chains loose in these bins. A good many of our orders were barrel shipments and others were individual orders shipped direct to the buyer. There were particular sizes in each barrel. Once in awhile we would have a mixed barrel. When we got [fol. 246] them in, we checked them and placed them in stock in the warehouse. We left them in the barrels. The chains were in bags in the barrels. There were a separate number of chains in each barrel and it depends on the size of the chain, how many are in a barrel, and we left them in the barrel until the orders came in. Everything had a place

according to size. We would place our regular Weed chains at a certain part of the building, running in sizes, our single pneumatics in another, our single solids in another, and single duals in another. We dealt by sizes. We acted no different on receiving an order for chains for a tractor than we did on receiving an order for chains for a truck because lots of times orders would come written up for a number of 40 x 5 single solid truck chains and again we would get another for 40 x 5 tractor chains which we know, unless specified W. K. was the same chain. At that particular time the only difference with relation to these chains was the W. K. Chains. That particular type of chain only fit the tractor made by them, but if we had a surplus stock of W. K. chains and someone wanted a number of 40 x 5 truck chains, we would cut off the extra lengths on one side of the chain. Outside of these special chains for special tires there was no difference in chains, except as to sizes, between chains made for use on trucks and for tractors. My work was solely in the warehouse. Occasionally if some rush order came in I would deliver chains to some part of the city or maybe on my way home deliver a pair. During the taxable period I think on one occasion I saw Weed chains [fol. 247] used on tractors. I saw Weed chains used on fire apparatus in the City of Chicago, hook and ladders and engines, in fact, I placed a pair of 38 x 5 regular Weed chains on the fire chief's car (the old Cadillac) at our warehouse. Those chains were no different in any way that I placed on the chief's car from the chains I would place on a privately owned car of the same make and size of tire. I would not say I have seen Weed chains used on police equipment, but I have sold, or delivered, or have filled orders for a good many chains of different sizes that were delivered to the City of Chicago. I am not in a position to say the purpose for which they were used, but I presume for all their officials to use. I filled orders for the City of Chicago designating delivery at 35th Street and also on, I think, Loomis Street, out of our regular stock that we sold for automobiles, tractors and trucks indiscriminately according to size. I filled their orders like that for other cities all over the Chicago territory. I could name the dates and probably a million and one cities but I would be here for two or three hours. It was generally cities of this territory, occasionally we filled orders for other territory out of Chi-

cago stock, like Tulsa, Oklahoma, we shipped an awful lot of extra heavy chains, I presume for the oil fields, and I would say several different orders went to municipalities. I filled orders for use in the construction and maintenance of roads during that period. Oftentimes orders came through marked for State highway commissions of this State or City and other places. That was true of Illinois [fol. 248] and other States in the Chicago territory. I couldn't say shipments were made direct to these commissions but there was a good many cases where jobbers would order them shipped to the State Highway Commission. The order would come through the jobber with instructions to ship to the Highway Commission. Those orders were by sizes and we filled them out of our regular stock. If we did not have them in stock we would assemble them in our warehouse the same as we would if they were orders for private automobiles or trucks. We had no special barrels or bins for State highway commissions, fire apparatus or police equipment. My duties during this period were in the warehouse and I am not very familiar with the use of these tire chains on various equipment, cars, and have not seen them operated. I filled orders for the Interior Department, Indian Reservation, but I don't know just how the orders were written up or anything of that kind but they were made to the Indian Reservation. The orders were written up first and sent over to us, maybe so many went to this service and so many to the other, of all sizes, regular car sizes as well as some single pneumatic trucks. I would not want to say positively that some could be used on tractors, as I think very few were tractors, it was mostly all passenger and single pneumatic truck chains that we shipped out of our regular stock. I don't know the numbers of those that went to the Indian Service, but it seems to me it would run pretty close to a hundred or better, something between 50 and 100 different places, that is, to different reservations.

[fol. 249] Cross-examination.

Read by Mr. McMahon:

As far as I know these orders must have come through the jobbers in the Highway Commission District. As far as I can recollect they would be marked by a certain jobber

and shipped to a certain highway department. Somebody took the order and we shipped them as specified on the orders and the fact that we shipped them to highway commissions led me to believe they would be used in road maintenance work outside of passenger cars if they were passenger cars, the chains should be with them too, I suppose, used for the same, or for their employees. I certainly would not think a passenger car chain would be used on a truck or on a tractor. I do not know of my own personal knowledge whether the highway commissions used those chains on trucks or on tractors. As to the chains shipped to the Federal Government during the taxable periods, I never saw those chains shipped and don't know whether they were used on trucks, pleasure cars or tractors. I have seen Weed chains used in and around Chicago on automobiles and trucks during the taxable periods. They were our regular sizes of chains which we sold for automobiles and truck use. The City of Chicago, as far as I can recollect, bought all sizes of chains, including cross chains, and the people of Chicago bought all sizes from the smallest size, to the 40 x 5 truck chains, the largest we make. Those were deliverd to jobbers in the city. I did not deliver them, I just filled their orders from the warehouse, but I saw chains in use on automobiles and trucks during the taxable [fol. 250] period in Chicago. I do not know how many tractors there were in use in the City of Chicago nor the Chicago trade territory during July, 1922 to June, 1924, inclusive. From my own personal knowledge and observation I would say there are more automobiles and trucks than there are tractors in the City of Chicago and our trade territory and I would say there are a great many more trucks and automobiles than there are tractors. As compared to the use of chains on automobiles and trucks during the taxable period, I would say the use of chains on tractors was comparatively small as compared to the use of chains on automobiles and trucks.

Redirect examination.

Read by Mr. Long:

The 40 x 5 chain, regular chain, could be used either on a tractor or a truck.

Recross-examination.

Read by Mr. McMahon:

In order to use the 40 x 5 Fordson tractor chain on a truck in some cases which I have seen they did not even cut the additional lengths off, but simply wired them back, to a part farther back and carried the additional lengths on the chain as surplus. The only instances I know where they cut them off during the taxable period was in our warehouse, when we ran short, as I think I said a while ago, if we ran short of regular 40 x 5 and had a surplus stock of 40 x 5 special chains, as we called them for W. K. wheels, why we would cut these additional lengths off, [fol. 251] rather than take the time to make the regular 40 x 5 chain. As a matter of fact the use of that Fordson tractor chain on trucks was limited only so far as our stock of chains was concerned in the warehouse.

George B. Kutz, a witness, whose deposition was taken on behalf of plaintiff, at Chicago, Illinois, on the second day of September, 1931, and presented at the trial, having been first duly sworn, testified as follows:

Direct examination.

Read by Mr. Long:

I have been a salesman for the American Chain Company since 1919 continuously selling all types of chains manufactured by that Company throughout the entire territory of the Chicago District comprising Indiana, part of Kentucky, Illinois, part of Iowa, Missouri, Kansas, and Colorado. I was engaged in performing those duties during July, 1922 to June, 1924, inclusive, selling what is known or referred to as "Weed Chains" or tire chain grips. They were generally designated as "Weed Tire Chains." I did not sell any other tire chains outside of "Weed Tire Chains." During the taxable period we did not have the competition from other tire chain manufacturers that we have today. These chains were used on automobiles, trucks and tractors; as a matter of fact, they were used for other vehicles that were horsedrawn, such

as test vehicles used around county fairs to show the pull-
[fol. 252] ing power of horses. In one particular case I had a photograph of a vehicle designed by the Bureau of Animal Husbandry of the Iowa State Agricultural College which I first saw at the first State Fair in Iowa many years ago. These other vehicles were outside of automobiles, trucks, and tractors. I have seen Weed chains added on tractors, fire apparatus and road equipment during the taxable period in the Cities of Chicago, St. Louis, and Kansas City. I saw chains used on tractors in Kansas City that I can be specific about but I did not see any chains used on tractors in the City of Chicago. In Kansas City the chains were being used on tractors by the Union Pacific Railroad for shunting cars in the yards, for moving cars, also for handling baggage on the trucks around the terminal. Outside of Kansas City I have seen tractors used on highways and out of Chicago, somewhere between Joliet and Ottowa. If road equipment includes snow removal, I have already answered that question. I have not seen chains in use on tractors in any other States. A Weed chain of suitable size can be used as well as on a tractor as on a truck. I sold chains that were put to use on tractors. I took orders for chains for the jobbers. I have sold chains for use on tractors, fire apparatus, and road equipment used in the construction and maintenance of roads. Outside of the instance I have mentioned, I have seen Weed chains used on automobiles, trucks, and motorcycles for Federal, State, or Municipal governmental purposes in my territory during the taxable period. I have seen the Gov-
[fol. 253] ernment use these chains for their post office trucks in the City of Chicago and in Kansas City, also for the same purpose. I have sold chains in Denver for the use of the Department of Interior in the Bureau of Reclamation. They were used in the Forestry Division of the Department of Agriculture. I cannot give you the uses of them exactly, they were used on cars, probably in the Forestry Division, by these men who are obliged to go from place to place. That is true also for the Department of Interior. Weed chains were primarily adapted for use on automobiles. At the time when tire chains were made there probably were no tractors and no fire apparatus to use them. At the time when there were tractors and fire apparatus or road equipment, they were equally well

adapted for use on the tires of tractors, fire apparatus, or road equipment. There probably were no fire apparatus at the time Weed chains were originally designed for automobiles. My experience would say the fire apparatus came much later. When it did come they used the same type or sizes, appropriate size of Weed chains. Weed chains for use on automobiles and trucks have no peculiar characteristics which are not identical with Weed chains for use on tractors, fire apparatus, or road equipment. Weed chains may be detached from automobile and truck tires and used on tires of the same size on tractors, fire apparatus, or road equipment without any change in the chains. The Weed chains sold by me during the taxable period in my territory for use on fire apparatus, police and road equipment, did not differ in any way from the Weed chains sold [fol. 254] and used on private automobiles and trucks. They were interchangeable. The Weed chains sold by me during the taxable period in my trade territory for use on automobiles and trucks for Federal, State, or Municipal governmental purposes, did not differ in any way from the Weed chains sold by me and used on private automobiles and trucks. They were interchangeable.

Q. Was there any peculiar characteristic about a Weed chain sold by you during the taxable period that prevented it from being sold for general use as a "Commercial Commodity"?

Mr. McMahon: The Government interposes an objection to that question for the reason that the witness has not shown himself qualified to answer, it calls for the conclusion of the witness and assumes facts to be true which have not been shown by the evidence. We press the objection as stated.

The Court: Overruled.

Mr. McMahon: Exception.

The Witness: May I have that question please? (Question read.)

The Witness: No, sir.

Q. Was there any peculiar characteristic about the Weed chain sold by you during the taxable period which made it primarily adapted only for use as a component part of a privately owned automobile or truck?

Mr. McMahon: The Government interposes an objection [fol. 255] to the question for the reason that the witness has not shown himself qualified to answer, it calls for the conclusion of the witness, and the evidence shows chains were primarily designed and adapted for use on automobiles and trucks prior to the advent of tractors. The Government presses the objection.

The Court: Overruled.

Mr. McMahon: Note an exception.

(Question read.)

The Witness: No.

In soliciting trade for the American Chain Company and selling these chains I dealt largely with jobbers, some dealers and some were actual users. I generally took the orders from the jobbers and would send them in to the Chicago office. I would say that most of the orders came in in that manner. Orders did not indicate where they were going to be used.

Cross-examination.

Read by Mr. McMahon:

There are no tire chains made for a one-ton Ford truck that will fit on any tractor. I told you a while ago that the chains I sold were adapted for use on trucks and tractors alike, which was a correct statement for the reason that there were no sizes given. As to interchanging larger or smaller sizes of chains used on trucks with chains used on tractors generally, if you had a truck chain of a large size, that chain could be readily put on a tractor providing that was of a similar size or of the same size. If the tractor [fol. 256] required a smaller size it might be necessary to remove part of the chain in order to make it fit. I wish it to be understood that during this taxable period I sold chains of different sizes, different tensile strength, and different weights for different uses, but want to qualify that "tensile strength" is not involved in the use of a tire chain. I know something about the duty requirements of a tractor with respect to tire chains. I cannot tell you the foot pounds necessary in a tire chain operating on a Fordson tractor on an asphalt pavement for the reason that it is an engineering question, which I cannot answer. I am

not an engineer. I am a practical man. My actual experience in the use of these chains shows you just what is necessary for consideration in the designing and building of chains. As to the duty requirements necessary in order to perfect a chain that will neither break nor be in excess to any degree of the traction power necessary to move the load without breakage, that condition would depend upon the road conditions. It would be necessary to design a chain that would take care of the peculiar road condition that you have in mind. I am not an engineer. I mean something when I say "equally adapted" that would be interchangeable. I never used the term "Commercial Commodity," it means much or it means little, it might be so many parts of steel. I do not remember Senator Long having asked me a question of that kind.

(Question read to the witness.)

[fol. 257] When asked that question I meant that it was something that was currently being sold. "Primary design" in the strictest meaning of my answer, was that the original invention of the Weed tire chain, that was the primary design. The Weed chain primarily was designed to provide anti-skid devices for automotive vehicles as near as I can remember, I cannot answer the question as to the kind of automotive vehicles because I do not remember what the designation was. The first development was the automobile as a pleasure vehicle. The original chain was designed for use on an automobile and used as such. The next stage of development was the truck. The same type of chain that was used for the automobile, was modified and used on the trucks. It was modified by weight and size both. That is not true with respect to the advent of the tractor. The truck chains that were currently used at the time of the advent of the tractor were applied to tractors. So far as I know these tire chains were primarily designed for use on the automobile pleasure car.

WILLIAM PARRISH, a witness, whose deposition was taken on behalf of plaintiff, at Chicago, Illinois, on the second day of September, 1931, and presented at the trial, having been first duly sworn, testified as follows:

Direct examination.

Read by Mr. Long:

During the years 1922, 1923 and 1924 I was directly and indirectly with the Ford Motor Company in Illinois, In-
[fol. 258] diana and Wisconsin helping liquidate the business of some of the first authorized distributors, such as the LaRue Motor Company, Chicago, Illinois and Bloomington, Illinois and formed the distributorship of the Middle-Blair Company and after that company was functioning I was with the Chicago branch. I am a sales engineer, as the term applies. During the time I was with the Ford Motor Company I was familiar with the tractors that were made by that company, that was my business. I am familiar with the publication known as the "Ford Owner and Dealer" and the "Ford Power Age." The Ford Owner and Dealer was a paper published by the Trade Press Publishing Company of Milwaukee, Wisconsin, not connected with the advertising department of Ford, but it reached all of the Ford dealers in its subscription list and a great many of the Ford owners. As the tractor business increased industrially in 1921 and 1922 they devoted quite a bit of space in their paper toward tractor items of news interest and later on published a section on different colored paper stock, which they later reprinted as the nucleus around which the separate publication of "Ford Power Age" was founded. Plaintiff's Exhibit 4 is the Ford Owner and Dealer of October, 1923, and pages 97 to 128, inclusive is the tractor part of the publication to which I referred. Pages 102 and 103 show cuts or representations of tractors and road equipment with tire chains on the wheels or tires, that is the lower picture on page 102 and the only picture on page 103 and possibly the picture on page 128. Plaintiff's Exhibit 6 is a bound copy of the
[fol. 259] Ford Power Age, a monthly publication beginning in February, 1925, through December, 1925. Page 20 of the March issue, the top picture on page 17 of the July issue, the bottom picture on page 10 of the December issue, and the top picture on page 20-B of the December issue describe or represent the same machines, the same tractors and road equipment that are described in Exhibits 4 and 5. Plaintiff's Exhibit 7 is a bound volume of twelve issues of the Ford Power Age in the January issue of which is shown

on page 10, the lower picture, a Fordson tractor with rubber tired wheels equipped with chains. Page 17 of the February issue, the top picture; page 33 of the March issue; page 6 of the April issue; page 30 of the April issue; pages 4 and 5 of the May issue; page 23 of the November issue; page 32 of the December issue contain cuts or representations describing or representing Ford tractors and other equipment that were made and sold during the taxable period July, 1922, to June, 1924, inclusive. The machines shown on those pages are typical of the machines that were made during the taxable period. Exhibit 8 is a letter from the publishers of the magazines offering to refresh my recollection and I present this as an explanation or key and testify to the truth of the statement. That is the letter I received from the publishers. Plaintiff's Exhibit 9, marked Industrial and Farm Uses of Ford Power Units is a reprint of Ford Owner and Dealer of April, 1924. Plaintiff's Exhibit 10-A and 10-B are pictures of two Wehr graders at work. Exhibts 10-A and 10-B show two Ford-
[fol. 260] son tractors with rubber tired wheels with chains on them, propelling a motor grader of the Wehr Motor Grader Company make and the letter under plaintiff's Exhibit 10-B is an explanation of the picture which was taken in the fall of 1923. I saw many machines about that time of which that one is a typical representation which were equipped the same as this machine. Plaintiff's Exhibit 34 (formrely 4 in the deposition) copy of Ford Owner and Dealer of October, 1923; Plaintiff's Exhibit 35 (formerly 5 in the deposition) copy of Ford Owner and Dealer of November, 1923; Plaintiff's Exhibit 36 (formerly 6 of the deposition) copy of Ford Power Age—February to December, inclusive, 1925; Plaintiff's Exhibit 37 (formerly 7 in the deposition) copy of Ford Power Age—twelve issues; Plaintiff's Exhibit 38 (formerly 8 in the deposition) letter from Ford dealer and service field; Plaintiff's Exhibit 39 (formerly 9 in the deposition) reprint of Ford Owner and Dealer, April, 1924; Plaintiff's Exhibit 40 (formerly 10-A and 10-B in the deposition) two photographs of Wehr graders; Plaintiff's Exhibit 41 (formerly 11 in the deposition) booklet entitled "McCormick-Deering Industrial Tractor and Operating Equipment"; Plaintiff's Exhibit 42 (formerly 12 in the deposition) booklet entitled "McCormick-Deering Industrial Tractor and Operating Equip-

ment'' as identified by the witness, offered and admitted in evidence. (Exhibit 13 of the deposition numbers was excluded by the Court as being immaterial and not within the taxable periods.)

[fol. 261] ARTHUR W. TURNER, a witness, whose deposition was taken on behalf of plaintiff at Chicago, Illinois on the 2nd day of September, 1931, and presented at the trial, having been first duly sworn, testified as follows:

Read by Mr. Long:

I am in the advertising department of the International Harvester Company and have been since January 1, 1927. Before that time I was assistant professor of agricultural engineering, Iowa State College from 1922 to 1924 and associate professor of agricultural engineering, Iowa State College from 1924 to 1927. The documents, Plaintiff's Exhibits 11 to 13 were taken from the files of the International Harvester Company here in Chicago. They were printed literature.

FRANK O. BLACKLEY, a witness, called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Swindler:

During July, 1922 to June, 1924, inclusive, I was supervisor of motor apparatus in the fire department of New Haven, Connecticut. During that time we had a fire apparatus vehicle made by the Webb Motor Fire Apparatus Company of St. Louis, Missouri, and the size of tires on that vehicle was 36 x 6. We used Weed tire chains on that [fol. 262] vehicle. In one station on Highland Street on the top of a hill when it was bad weather, icy weather, we used chains on all four wheels.

Cross-examination.

By Mr. McMahon:

This Webb Motor Fire Apparatus was an automobile chassis. It was made and assembled by Webb and was not a standard chassis of any kind.

HARRY B. PAGE, a witness, called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Swindler:

During July, 1922 to June, 1924, inclusive, I was chief of the Department of Fire Service at East Haven, Connecticut. During that period we had a piece of equipment with a Cadillac automobile chassis having 36 x 4½ tires. We used chains on that vehicle. The name of that vehicle was Cadillac. It was a combination hose and chemical.

Cross-examination.

By Mr. McMahon:

We did not have other motor driven vehicles in that department. No pleasure cars and no chief's car.

[fol. 263] PATRICK GALLAGHER, a witness, called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Swindler:

During July, 1922 to June, 1924, inclusive, I was employed by the Blue Ribbon Tire Service. My position which I have held for about eighteen years, is to apply and to replace solid tires on a particular class of trucks. That is a 40 x 5 solid tire known as a tractor tire. That tire was taken from a three and one-half ton Mack truck by myself. Sometimes the marking on those tires shows the size. On the side walls of the tire it is marked in places "tractor type." It isn't as though it could be used for that particular type alone, it may be used for any other over the road. That is any other wheel that has a 40 x 5 tire on it. This is marked "tractor type" on the tire. That truck from which that tire came was in use during 1922 to 1924. Plaintiff's Exhibit 43—solid tractors tire on rim as identified by the witness, offered and admitted in evidence.

Cross-examination.

By Mr. McMahon:

Plaintiff's Exhibit 43 has stamped on it, set out from the rubber the words "tractor type." Some tires of that size have the words stamped into the tire "truck type" and "heavy duty" and then again some of them have the words "tractor type." Plaintiff's Exhibit 43 was not used on a Mack three and one-half ton truck during the taxable period. Plaintiff's Exhibit 43 required a 40 x 5 single solid [fol. 264] chain or dual chain. I did see Exhibit 43 in use on a tractor but I have seen tires of the same type or make and size in use on a tractor. Some of those tractors were made by Ford and some were made by others. I never saw this particular type of tire marked Exhibit 43 in use on a Ford tractor. If you placed a 40 x 5 dual chain on Plaintiff's Exhibit 43 you would have to have two tires on the one wheel, that is another one of these tires. A 40 x 5 dual solid chain will not fit this one tire, Plaintiff's Exhibit 43. A 40 x 5 single solid chain will fit Plaintiff's Exhibit 43.

Redirect examination.

By Mr. Swindler:

(Witness places two chains comprising Plaintiff's Exhibit 8 on the tractor and truck tires being Plaintiff's Exhibit 15 and Plaintiff's Exhibit 43.)

Recross-examination.

By Mr. McMahon:

To my mind it is necessary that Plaintiff's Exhibit 8 have three idle links and possible room for securing another idle link providing one is available and that the rim chain which extends around the circumference of the wheel comes below the steel rim of the wheel to which the rubber is fastened because it has got to come below the tire rim and the wheel in order to stay and take hold. If the side chain or rim chain of Plaintiff's Exhibit 8 extended down to the top of the steel rim to which the rubber is fastened, I don't think [fol. 265] it would hold that chain on that tire. It would have a tendency to roll off because it won't have overhang enough on the wheel. It has about three or four inches

overhang over the top of the solid rubber but with the traction on the tire not connected with the road that wouldn't have enough support in that angle to hold it on the wheel. I have seen a chain similar to Plaintiff's Exhibit 8 on an inflated pneumatic tire. It has got to be loose on the pneumatic tire for the simple reason that if you get it right on the pneumatic tire inflated, probably to 50 pounds in the high pressure or about 30 to 35 pounds in the low pressure type it creates hard riding and at the same time it has got a tendency to cut into the rubber of your tire if it is too tight. If you applied a 40 x 5 chain to the ordinary pneumatic 40 x 5 tire you would not necessarily have the three extra links available. As a tire wears down you have got to adjust them links accordingly. Plaintiff's Exhibit 43 was much higher with rubber than it is now. They vary from year to year in the height of the tire. Plaintiff's Exhibit 43 could possibly be about 5/16 of an inch higher, that is more rubber on it. With 5/16 of an inch more rubber on Plaintiff's Exhibit 3 it is possible you would still have these three loose links hang on this chain but as a rule we tie those links back. Those three links did not have any use in connection with that chain on that particular tire, but if at any time that tire should be replaced by another tire of a higher type those extra links would make up the difference without having to buy a new chain. So far as this particular tire is concerned, Plaintiff's Exhibit 43, you [fol. 266] could cut these three links off each side of the chain and still use the chain on this tire but to my mind it would not be good policy because you might want to use that chain on some other tire that would have a higher profile. Plaintiff's Exhibit 15 on which you have placed a 40 x 5 chain (Plaintiff's Exhibit 8) contains three extra links and the same thing applies to this exhibit that applied to Plaintiff's Exhibit 43 but I would not recommend cutting the three extra links off because you might want to use the chain on another tire. It could be done but not to good advantage. So far as Plaintiff's Exhibit 15 is concerned, you do not need those three links in order to use that chain on Plaintiff's Exhibit 15. This 40 x 5 chain fits Plaintiff's Exhibit 15 tighter than the 40 x 5 chain fits Plaintiff's Exhibit 43. Plaintiff's Exhibit 15 has a wider crown than Plaintiff's Exhibit 43. The chain on Plaintiff's Exhibit 15 is tighter than the chain on Plaintiff's Exhibit 43. I account

for the difference of fit between Plaintiff's Exhibit 15 and 43 because there is hardly any two tires of different makes that are the same in width, in cross sections or in height.

Redirect examination.

By Mr. Swindler:

It is just as easy to put these chains on a truck as it is on the rim of these wheels in the Courtroom. I am able to put them on a truck or tractor and get them as tight as they are here if I was applying the chain myself. If I had it to do myself I would put it on as tight as I wanted it or as loose [fol. 267] as I wanted it. As near as I know the three extra links on the side chains of each of these exhibits have been used to take care of the different sizes, height and profile of the tires of different manufacturers. The difference in looseness between the chain on Plaintiff's Exhibit 43 and Plaintiff's Exhibit 15 is due to the different make and a different crowned tire.

Recross-examination.

By Mr. McMahon:

I could not say as a matter of fact that a tire with a narrow tread does not require as wide a chain as a tire with a wide tread. That would be entirely up to the manufacturer.

William F. Cotter, a witness, recalled by plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Swindler:

I understand what is meant by the taxable period from my testimony. A 32 x 4 tire chain will fit a 32 x 3½ tire. That size is interchangeable and was during the taxable period. During the taxable period I recall that we had 48 each special sizes that were termed interchangeable sizes. Those sizes would fit a tire other than those of a size marked on the chain just as well as it would fit a tire of the particular size marked. In fact I had a list that I used

during that time with our distributors and would trade in a [fo.l 268] general way. I used it at jobbers sales meetings as a manner of safeguard for the jobbers' interest as well as our own in pointing out the interchangeability of certain sizes of Weed tire chains. By interchangeable I mean in an emergency should their stocks be extinct of any given size or sizes, they were free to draw from these interchangeable sizes to take care of any conditions that they met and by an emergency I mean during a snow or ice or sleet condition when the demand for tire chains is tremendous and everybody wants equipment, so that the interchangeable sizes particularly were a safeguard during the tag end of the season and helped the merchants unload stocks preparatory for another season and on every occasion I personally tried on a number. I have seen in jobbers' stockrooms a list of Weed tire chains along with the interchangeable sizes. I could illustrate that by referring to Plaintiff's Exhibit 43. We will assume the size 32 x 3½. I haven't a list of specifications outside of that one size with me but the same principle applies to all of the so-called interchangeable sizes. It was the policy of our company to supply the district men with a complete outline of specifications to which they could refer and inform their trade as regards the interchangeability of any size. Taking a 32 x 3½. In the specifications of that size the side chains would be 91⅝ inches long. The side chains are the chains to which the cross chains are connected. That is always known as the side or rear chain. The cross chains are connected to the side chains on that given size would [fol. 269] measure 7¾ inches long. Assuming that a cross chain was one inch longer, that, of course, would carry accordingly throughout the chain entirely. That would simply bring our side chain down one-half inch here and up one half inch here, all around. That would shorten your cross chain but would have no interference on the performance of the chain after it is harnessed to the tire. As to making the chain fit more loosely on the tire there is always a tolerance when you are using a metal of this kind that you would have to allow for. For example there is a condition in tire chains absolutely beyond our control and I know our company has experimented in testing for years. It has always had a certain amount of stretch in tire chains. For example after travelling we will say 40 or 50 miles if

the owner is not familiar with putting on tire chains as tight as he should there is all the more tendency for that tire chain to stretch one link in that 50 miles of travel so we have always considered that it is an asset to have one or two extra links on a tire chain that takes care of the vehicle or tire when it is new and if it is superfluous on the tire chain it simply can be clipped off with a pair of pliers. I was instrumental in procuring our company to develop our "sturdy pliers" to sell to the consumer to take care of any condition that was not cared for in the tire chains after they were in use 100 or 200 miles.

Our engineers would probably be delegated to Akron, Detroit or New York, or some other point to locate a new tire, say 34 x 4. The market had been ransacked to find the largest given tire of any size. A tire chain is made to [fol. 270] fit that size. I mean to fit that largest size, the largest size produced. To avoid penalizing the trade by requiring them to carry a multitude of sizes, our company's policy has always been to take the largest size tire, make the tire chain to fit that largest size tire on the market so that if it fitted the largest size tire it would take care of anything in that range. That is the reason there are two or three extra links on each chain. It is a fact that there are two or three extra links on the average tire chain on account of different tires being made in different molds. These interchangeable sizes that I speak about because the side chains on the wider and larger sizes would be lower, it just simply travels lower than the standard size and the cross chains would be longer. The function or performance of a tire chain is to creep around the tire so as not to be injurious. If that chain, for example, was anchored there, eventually the rubber would be gouged out for four inches. I have seen that and recommended to fire departments and others to get away from the real tight chain for any duration of travel. The following sizes are interchangeable: 28 x 3½, 35 x 4, 38 x 5, 32 x 3½, 36 x 4, 33 x 5½, 33 x 3½, 36 x 4½, 37 x 5½, 30 x 4, 37 x 4½, 35 x 6, 34 x 4, 36 x 5 and 30 x 5 are all interchangeable with some other size. Regular Weed chains 32 x 3½ uses 32 x 4, 33 x 3½ uses 32 x 4 or 32 x 4½. By uses I mean that size tire will use those size of chains. If a 33 x 3½ isn't available the other size may be substituted for that. A 30 x 4 uses 29 x 4½, 34 x 4 uses 35 x 4 or 33 x 4½, 35 x 4 uses 34 x 4½ or

33 x 5, 36 x 4 uses 35 x 4½ or 34 x 5, 36 x 4½ uses 35 x 5, 37 x 4½ uses 36 x 5 or 37 x 5, 36 x 5 uses 37 x 5, [fol. 271] 36 x 5 uses 37 x 5; 33 x 5½ uses 34 x 5, 35 x 5½ uses 35 x 5, 37 x 5½ uses 38 x 5. Those are the interchangeable sizes in the regular Weed chains which I mentioned. With respect to dual solid chain sizes, we have 34 x 7, 34 x 4, 38 x 6, 32 x 4, 34 x 5, 34 x 3½ 40 x 4 and 37 x 4. The interchangeable sizes with the sizes I have just given are: 34 x 7 uses 36 x 6, 38 x 6 uses 40 x 7, 40 x 4 uses 38 x 4½, 37 x 4 uses 38 x 4 or 38 x 3½, 34 x 4 uses 36 x 3½ or 34 x 4½, 32 x 4 uses 34 x 3½ or 32 x 4½, 34 x 3½ uses 32 x 4 or 32 x 4½. With respect to pneumatic tire chains we have the following sizes: 35 x 4, 35 x 6, 33 x 4½, 37 x 6, 34 x 4½, 37 x 6, 34 x 4½, 39 x 7, 37 x 5, 40 x 7, 32 x 6, 44 x 10 and the sizes interchangeable with those sizes are: Single pneumatic truck chains 35 x 4 uses 34 x 5, 33 x 4½ uses 34 x 5, 37 x 5 uses 36 x 6, 32 x 6 uses 33 x 5, 35 x 6 uses 36 x 5, 37 x 6 uses 38 x 5, 39 x 7 uses 38 x 8. With respect to single solid tire chains we have sizes 32 x 3, 34 x 4, 35 x 6, 34 x 3½, 35 x 4, 34 x 7, 32 x 3½, 36 x 4½, 34 x 8, 34 x 3½, 34 x 5, 40 x 9, 32 x 4, 37 x 5, 32 x 10. The sizes that are interchangeable with those sizes are: 32 x 3 uses 32 x 3½, 32 x 3½ uses 30 x 4, 34 x 4 uses 36 x 3½, 36 x 4½ uses 36 x 5, 37 x 5 uses 36 x 6, 35 x 6 uses 36 x 6 or 36 x 5, 34 x 7 uses 36 x 7 or 36 x 6 and 34 x 8 uses 36 x 7. What I mean by the word "use" in that particular sense is interchangeable or substitution or that it might be used satisfactorily instead of the other size.

Q. Were such sizes as you have testified to commonly used interchangeably for the sizes you have stated?

[fol. 272] Mr. McMahon: The defendant objects to the question because the question calls for the conclusion of the witness and the witness is not qualified to answer, it assumes facts to be true which have not been shown by the evidence, it is immaterial to the issues in this case, incompetent and not the best evidence and usurps the power of the jury.

The Court: Overruled.

Mr. McMahon: Note an exception.

A. They were.

The Court: I understand you are speaking of the taxable period?

A. Yes, your Honor.

Cross-examination.

By Mr. McMahon:

Q. You are a salesman for the American Chain Company?
A. Yes, sir.

HARRY O. MAINZINGER, a witness, whose deposition was taken on behalf of plaintiff, at Detroit, Michigan, on the third day of September, 1931, and presented at the trial, having been first duly sworn, testified as follows:

Direct examination.

Read by Mr. Long:

During the taxable period July, 1922, to June, 1924, inclusive, I was sales manager of the Whitehead and Kales [fol. 273] Company, builders of tractor wheels, both agricultural and industrial wheels. We did not build tractors. We used the Fordson tractors and built wheels for the Fordson tractors. During the taxable period we bought and sold Weed chains. Our dealers were the Ford dealers and we sold the chains with our wheels to our dealers and the distributors throughout the United States for use on our tractor wheels. We started our business early in 1921 and continued the business up to March 1, 1930. I spent about half my time traveling throughout the United States regularly, visiting distributors and going out on demonstrations to see the tractors work. I have seen Weed chains used on tractors and road equipment in Illinois, Ohio, Michigan, New York, Pennsylvania, New Jersey, Texas, Missouri, Kansas, Iowa, Minnesota, Wisconsin and Colorado, in demonstration work and actual use. We did not make the tires for our wheels. We just made the wheels and bought the tires and chains.

Q. Can a Weed chain of suitable size be used just as well on a tractor as on a truck?

Mr. McMahon: The Government objects to that question for the reason no proper foundation has been laid, the witness is not qualified to answer and it assumes facts to be true which are not shown by the evidence. The Government presses the objection.

The Court: Overruled.

A. Yes, sir.

[fol. 274] We sold or used on the tractors Weed chains designated as 40 x 5 solid and 40 x 5 dual solid. I have seen Weed chains used on trucks for federal, state or municipal governmental purposes.

Q. Have Weed chains for use on trucks any peculiar characteristics with respect to general design, which are not identical with Weed chains for use on tractors?

Mr. McMahon: The Government objects to that question for the reason no proper foundation has been laid, the witness has not shown himself qualified to answer, it calls for the conclusion of the witness. It assumes facts to be true which have not been shown by the evidence. We press the objection.

The Court: Overruled.

Mr. McMahon: Note an exception.

A. No.

Weed chains may be detached from truck tires and used on tires of the same size on tractors or road equipment without any change in the chains. Weed chains sold during the taxable period in our territory for use on tractors and road equipment did not differ in any way from Weed chains sold and used on private trucks. They were interchangeable Weed chains sold during the taxable period in our territory for use on trucks for federal, state or municipal governmental purposes did not differ in any way from Weed chains sold and used on private trucks.

Q. Was there any peculiar characteristic about Weed [fol. 275] chains sold during the taxable period that made them ordinarily unsuitable for sale and general use as a commercial commodity.

Mr. McMahon: The Government interposes an objection to that question for the reason no proper foundation has been laid. The witness has not shown himself qualified to answer, it calls for the conclusion of the witness and as-

sumes facts to be true which have not been shown by the evidence. The Government presses the objection.

The Court: Overruled.

Mr. McMahon: Note our exception.

A. No.

Page 15 of Plaintiff's Exhibit 1 is a little catalogue we got out when we first started to build this equipment in 1921 and I would say it was printed before the taxable period, but used during the taxable period. Plaintiff's Exhibit 44—Whitehead & Kale Catalogue (formerly Plaintiff's Exhibit 1) offered and admitted in evidence. Page 15 of Plaintiff's Exhibit 44 shows a dual rubber tire wheel and a method by which it is attached to the original single wheel. It also shows an extension rim, which in the early stages we used to build. The theory was that the cleats on the rim being about one inch below the rubber when the tractor sunk into the earth, and the going was soft, that cleat would then come into play and give traction. Practically, it did not work simply because the cleat kicked out the loose dirt from under it and the wheel would not sink in far enough to give you real traction. That was called a wheel with an extension weight and extension rim. When [fol. 276] we found we did not get sufficient traction, we tried to work out a scheme of putting a chain on the wheel, but the extension rim on the outside did not permit the side chains of the chain to drop down low enough so we could take up the slack and keep the chain tight, as was the case on the inside of the wheel. Therefore we had to make the side chains on the outside longer than we did on the inside. There was probably a difference of around six inches in the side chains. There was not much production of that peculiar type of wheel and not to exceed 50 sets of chains were made that way. The use of that wheel was shortly abandoned. Plaintiff's Exhibit 2 is a photograph we had taken for advertising purposes at the Michigan Central Railroad Yard on Livernois Avenue, in Detroit, about 1923 or 1924. It represents a Fordson tractor with Whitehead & Kales wheels, Weed chains and Whitehead & Kales trailers. Plaintiff's Exhibit 45 (formerly Plaintiff's Exhibit 2)—photograph of Fordson tractor offered and admitted in evidence. Plaintiff's Exhibit 46 (formerly Plaintiff's Exhibit 3)—photograph of Fordson tractor with

Whitehead & Kales wheels, taken at Wayside Inn, north of Boston, especially page 15, offered and admitted in evidence. The photograph shows a Fordson tractor with Whitehead & Kales wheels, 40 x 5 dual tires and Weed chains.

Cross-examination.

Read by Mr. McMahon:

By equally adapted I mean the chain in this particular case is adapted as well to a wheel on a tractor as it is on a [fol. 277] truck, so long as the tire sizes are the same, that is I mean it will work as well on a tractor as on a truck. By "equally adapted" I mean a chain can be used on a truck or used on a tractor providing the tire size requirements are the same. By commercial commodity I mean an item which is generally used about an automobile or a truck. It might be a wrench, or an automobile jack. It may be any tool or contrivance used on or in conjunction with cars or tractors. I would say chains in this case would be a commodity. By commercial commodity I mean something that is bartered and sold regardless of the specific articles. That table if bartered and sold would be a commercial commodity. Tire chains for use on our Fordson wheels were interchangeable for use on truck wheels. We did not have to do anything with them in order to use them on the truck wheels if the tire size is the same. The chain required for the special Fordson tractor wheel, that is the chain requiring a side chain 6 or 8 inches longer on the one side than on the other, was not interchangeable for use on truck tires. Only a limited number of those chains were made, approximately 50 in all. Upon elimination of the extension rim the wheel required a standard chain. There were only two sizes of those, that was a chain for a 40 x 5 single solid tire and a chain for a 40 x 5 dual solid tire. Those chains were equally adaptable for use on a truck or tractor. That is not true with respect to tractors having steel wheels because no chain is required. It has a cleat or grouser on the wheel rim. Those are commonly [fol. 278] referred to as mud lugs. A chain adaptable for use on a truck is not adaptable for use on a tractor having steel wheels. There would be no use for a chain on such wheels and I only wish it understood that interchangeable

chains apply only to wheels having rubber tires. I do not know which was first in the point of time, the advent of the automobiles or the advent of the tractor. I do not know which was first in the point of time, the advent of the truck or the advent of the tractor. I would not say there were more tractors in operation during 1922, 1923 and 1924, than there were automobiles and trucks, there were many more automobiles and trucks in use during those years than there were tractors. I examined the Weed chains closely which I indicated were used on governmental, state and municipal vehicles to the point of handling them, putting them on and driving them. I have not handled them in all cases that I testified I have seen. I could not say that my company sold all of the chains in our territory during 1922, 1923 and 1924, as chains could be bought from the many jobbers and distributing points and it is impossible when you see a tractor operating with chains on it to determine from whom the chains were purchased. We sold Weed chains along with the tractor equipment through our jobbing and dealer set-up, but illustrated or listed them as separate items so they could order with or without chains as they might prefer, if they prefer, chains went along as part of the original equipment. I would say that automobiles and trucks during the years 1922, 1923 and 1924 used more chains than tractors did.

[fol. 279] Q. As a matter of fact, is not the chief use of chains on or in connection with automobiles and trucks?

Mr. Long: Plaintiff objects to that question because it calls for an irrelevant, incompetent and immaterial answer, seeking to show the chief use of these chains. We press the objection.

The Court: Sustained.

Mr. McMahon: Note an exception.

I am unable to answer whether or not a Fordson tractor requires a heavier chain or a chain possessing greater tensile strength than is required by the ordinary Ford roadster. My company during the years 1922, 1923 and 1924 did not sell different sizes of chains for different uses. There is a difference in the size between a 40 x 5 solid and a 40 x 5 dual. The difference is in the length of the cross links. We sold a chain for a 40 x 5 solid single and a 40 x 5 dual. The cross links on the dual are longer than on the single. The

weight of the dual is heavier but the material is of the same weight. It is heavier by vitrue of the fact that the cross links are longer. We did not sell chains for federal, state or municipal governmental purposes in the absence of a sale of a tractor.

Redirect examination.

Read by Mr. Long:

I have seen chains in use on tractors doing road grading work, road maintenance work, snow removal work and general road repair. I have seen Fordson tractors so equipped [fol. 280] with chains in the different states I mentioned in my previous testimony. I do not recall that I have seen Fordson tractors equipped with chains during the taxable period that were doing excavation work.

Recross-examination.

Read by Mr. McMahon:

During 1922 on some work Fordson tractors required chains every day with the tractor work. They require chains when they would work on road sides, plowing dirt for road grading work. Chains were used in 95% of the cases. I am not in a position to tell the number of days in the year that the tractor was doing road grading work. As a general thing chains are used only in inclement weather, when the ground is rendered soft by the weather and remains soft by reason of the action of the elements, that is where the dirt is loose, so that the tire would not get traction. Outside of the specific grading uses where special traction is necessary, chains are hardly if ever used on Fordson tractors during favorable weather and the use of chains on tractors outside of the specific instances, is limited. That was true in 1922, 1923 and 1924. My company did not sell all of the tire chains used on Fordson tractors throughout the United States during 1922, 1923 and 1924. Our sales of chains were chiefly made as part of the original equipment, dependent upon the wishes of the customer.

[fol. 281] Walter M. Cusack, a witness, whose deposition was taken on behalf of plaintiff, at Cincinnati, Ohio, on the

fourth day of September, 1931, and presented at the trial, having been first duly sworn, testified as follows:

Direct examination.

Read by Mr. Long:

During July, 1922 to June, 1924, I was employed as a salesman by the American Chain Company with headquarters in Cleveland, Ohio. During that period I both sold and used Weed chains. When I was travelling through the south, I used Weed chains almost continuously during 1922 and 1923 because there were very few roads that you did not need chains on during that time. At that time I travelled in the states of Virginia, North Carolina, South Carolina, Alabama, Tennessee, Louisiana, Oklahoma and part of Texas. During that period I have seen tire chains used at a great many points in this country and saw them on practically every piece of rolling equipment that was equipped with automobile tires whether it be motorcycle, truck, automobile, taxicab, buses, tractors or road equipment. By automobile tires I mean rubber tires. I have seen Weed chains used on tractors, fire apparatus and road equipment during the taxable period. It is a common occurrence in the south to see tractors sitting on the side of the road, equipped with chains waiting to pull someone out of the mud. I have been pulled out of the mud many times by such tractors during the taxable periods.

Q. Can a Weed chain of suitable size be used just as well [fol. 282] on a tractor as on a truck, provided the tractor has rubber tires?

Mr. McMahon: The Government interposes an objection for the reason that it calls for the conclusion of the witness, the witness is not shown to be qualified to answer, and it assumes facts to be true not shown by the evidence. The Government presses the objection as stated.

The Court: Overruled.

Mr. McMahon: Note an exception.

A. Yes.

I have seen Weed chains used on tractors at various points in the south, in lumber camps and on road scrapers at different places. Weed chains were used on tractors in the construction of roads, I would say more in the main-

tenance of roads pulling a plow to level the gravel or shale roads. At times I have seen those tractors equipped with Weed chains. I sold chains largely through jobbers. The sizes were of a very wide range, running from chains for passenger cars, 30 x 3 in that period, up to 44 x 10 which was not a popular size. The popular sizes on tractors were 40 x 5, 40 x 7, 40 x 8 and 40 x 10, both single and dual. Those same sizes of Weed chains were also used on trucks that I have seen in my territory during the taxable period. I have seen Weed chains used on fire apparatus in the city of Cincinnati, and I have seen them used in Louisville and Pittsburgh. I have undoubtedly sold chains for such use [fol. 283] through the jobbing trade. My sales are with the jobber. The 40 x 8 was a rather popular size on fire equipment. That particular size I believe was used more on what they call light pumpers with solid tire. There was some 40 x 6 equipment and I am certain 34 x 6 was a size that was used on the pumpers, hose reels, hook and ladders, and maybe the supply wagon. Similar sizes were also used on that equipment such as 33 x 5, 34 x 5 and 35 x 5. Those were used on the smaller light type such as supply wagons and in the smaller communities on smaller fire fighting equipment. I would say the fire departments were liable to use any size tire chain we make that would fit small roadsters up to the highest class cars, such as the chief of a fire department would use. I have seen Weed chains used on post-office trucks, for state road equipment, and municipal fire and police cars. Weed chains used on automobiles or trucks have no peculiar characteristics which are not identical with Weed chains for use on tractors, fire apparatus or road equipment. Weed chains may be detached from automobile or truck tires and used on tractors, fire apparatus and road equipment with the same size tires, without any change in the chains. Weed chains manufactured and sold by the American Chain Company, in which the taxes in these suits were paid, were interchangeable for use on tractors, fire apparatus and road equipment, providing the sizes were comparable. Weed chains sold during the taxable period in my territory for use on fire apparatus, police and road equipment did not differ in any way from Weed chains sold and used on pri- [fol. 284] vate automobiles and trucks. They were interchangeable on comparable sizes of tires. Weed chains sold

during the taxable year in my territory for use on automobile- or trucks for federal, state or municipal governmental purposes did not differ in any way from Weed chains sold or used on private automobiles and trucks, the sizes being comparable. They were interchangeable with like sizes. There were no peculiar characteristics about Weed chains sold during the taxable period in my territory which ordinarily made them unsuitable for sale and general use as a commercial commodity. I know of Weed chains for use on tractors that were reinforced by additional cross chains. Such chains when reinforced with cross chains were also used on trucks.

Cross-examination.

Read by Mr. McMahon:

By equally adaptable I mean that the chain could be taken off of one tire of corresponding size and put on another tire and of the same size provided they were both rubber tires. By primarily adapted I mean the chain can be used, interchangeable for use generally, that there had to be no basic change in the construction to switch from one piece of equipment to another of corresponding tire size. By primarily adapted, equally adapted, I mean where comparable sizes of tires are in use that the chains may be interchanged. By commercial commodity, I mean something that can be sold out over a counter or store, that is something that is bartered and sold. I do not know how many chains the American Chain Company paid tax on. [fol. 285] I did not pay the tax and was not present when the tax was paid. I do not know anything about the actual payment of tax between the American Chain Company and the Collector of Internal Revenue as to details. Throughout all of my territory comprising practically the central and southern parts of the United States I have seen chains used on automobiles and trucks more frequently than I did on tractors for the simple reason there were so many more automobiles and trucks running than tractors. The advent of the automobile is first in the point of time. The advent of the truck as compared to the advent of the internal combustion tractor was first. I judge the tractors were later. Automobiles and trucks were using tire chains prior to the advent of the internal combustion tractor. I

would not say that upon the advent of the tractor they applied the tire chain that was formerly used on trucks and automobiles to the tractor. The tractor did not require a heavier chain, I would say they used the same chain for that size wheel. We did not put the chain on the tractor during the period we are speaking of. The wheel to carry a rubber tire was made special, that is, the tractor came equipped with different type wheels. A certain company made them up to carry a wheel that would become part and parcel of the tractor and our chains simply went on that wheel. They were chains that we formerly used for automobiles and trucks and it sold during that period for automobiles and trucks. We sold those chains for use on these tractors when the tractor came [fol. 286] into existence. Not all tractors have rubber tires. They have steel wheels or the caterpillar type of tractor. There are cleats on the steel wheels to keep them from slipping. They all used cleats to describe the general coverage. You do not ordinarily use chains on a steel wheel and all of my testimony is based on wheels having either solid or pneumatic rubber tires. Balloon or semi-balloon tires were not in existence in 1922, 1923 and 1924. It seems to me it was a later date that the balloon tires first came out. I cannot answer how many chains were sold to the post-office department in my territory during 1922, 1923 and 1924. The jobber sells the department. I never sold direct to municipal or state highway commission. I sold the jobber and the jobber in turn sold the highway commission of the state.

Redirect examination.

Read by Mr. Long:

I do not know of any extension tire that was used in my territory. One company put out as an experiment what they called an extension rim wheel that had a small extension rim on every wheel. That company was Whitehead and Kales Company of Detroit. I only saw one of those. The American Chain Company made a chain especially for use on those wheels. We had to make the side chains that went on the outside a few links longer to take care of that extension rim. We called that a special. Very few of those were sold. That wheel was discontinued and with the dis-

continuance of the wheel there was a discontinuance of the [fol. 287] chain made to fit it. I have seen the list of the company covering the taxes paid during this period in which they ask for a refund that was made to the Bureau of Internal Revenue and I am basing my statement that the taxes were paid on that list.

HARRY SEIDENSPINNER, a witness, whose deposition was taken on behalf of plaintiff, at Cincinnati, Ohio, on the 4th day of September, 1931, and presented at the trial, having been first duly sworn, testified as follows:

Direct examination.

Read by Mr. Long:

During July, 1922 to June, 1924, I was assistant Superintendent of Equipment for the Cincinnati Fire Department. My duties are supervision of fire hydrants for the Cincinnati Fire Department, which has been my position for the past fourteen years. By equipment, I mean the fire apparatus in the Fire Department. As a part of my duties it was necessary to see that the fire equipment was in proper repair. During that time we used Weed chains on that equipment. I had nothing to do with the purchasing of them. All I had to do was with their use in inclement weather, or rather in the winter time during snow and ice and sometimes we put them on during heavy rains when the streets were slippery. I could not tell the exact sizes of chains offhand because we changed from solids to pneumatics after they developed the pneumatic tire. During the [fol. 288] taxable period we used pneumatics on some of the lighter apparatus and all of the big stuff, the pumpers, ladder trucks and water towers came through with solids. We used Weed chains on practically all of the equipment including roadsters, officers' cars, marshals' cars and the cars used by fire alarm telegraph service in going around the city to make repairs. We also used them on the lighter equipment called Booster, which is a combination of a hose wagon carrying a small pump in the front which we used in suburban territory. The heavier equipment that we termed our pumpers, hose wagon and pumping engine combined,

service truck, ladder wagon which does not carry an aerial ladder, aerial ladder wagons and on water towers we used Weed chains. The water tower is a special tool to be elevated in the air to put water on a higher floor than we can reach from the street level in a larger stream. That vehicle is a tractor-drawn piece of apparatus, similar to a tractor, having six wheels. We used during that period skid chains on the two rear tractor wheels, but nothing on the others. We have two trucks that we call supply trucks that deliver supplies from house to house, then we have little trucks which we call repair trucks. They were Fords that had a half-ton body on them. We used Weed chains on the rear wheels to get tractive power. The sizes of chains we have in stock now are similar to those we had during the taxable period. We had a 40 x 8, 38 x 7, and we used to take a chain if it was large, that was bought for one size of the small stuff, and we would add lengths to it to make it [fol. 289] longer, or we would take off a few lengths to make it fit a smaller wheel. We didn't carry such a supply on hand. We run our stock on an economical principle. I would have to get our records to see what size chains we carry in stock. We have been changing cars right along and changing tires and we would change these chains, as I told you before, either add lengths to the side chain or shorten it. During the taxable period I saw chains on private trucks and automobiles here in the city which were similar in appearance to the chains we were using on our fire equipment. We did not use chains every day and used them only when the weather conditions demanded. We had a code signal in the Fire Department, or code system, so that whenever we deemed it necessary for the safety of the apparatus to supply chains, if the superintendent of equipment or any of us assistants noticed from our observation while driving through the city streets that they were getting slippery or were in a slippery condition, we would notify the fire tower operator to send out the signal to drive carefully, slippery streets, and he would code that signal 3-6, and the men in the engine houses would observe that signal as it came over the tape and they would immediately apply the chains to the tires. That was the rule of the Fire Department and was during that period and still is. Oftentimes the signal would not go out. The men would apply the chains from their own observations without the signal.

It was only through riding in different parts of the city [fol. 290] that would be discovered. Like I would get out in the morning and the flushers would be out the night before flushing and the streets would be kind of frosty or there was a film of ice on the streets which this company had no opportunity to observe, we would signal out for that reason. During the taxable period in my official business I have driven a car that was equipped with Weed chains.

Cross-examination.

Read by Mr. McMahon:

In 1922 I drove a Nyberg and Buick. Those were passenger cars, roadsters. The water tower was pulled about the city by an ordinary internal combustion tractor which could be uncoupled from the tower apparatus and moved away. The ladder wagons are all pulled by tractors but not the pumpers. You could uncouple the tractor from the wagons and let them set provided you put jacks under the ladder wagons to hold them up. The pumpers were part of a truck rather than a tractor. Based upon my experience, I would say that the use of chains on fire apparatus throughout the years 1922, 1923 and 1924 was limited as compared to the use of chains on privately owned automobiles and trucks.

[fol. 291] HOWARD M. SINES, a witness, whose deposition was taken on behalf of plaintiff, at Cincinnati, Ohio, on the 4th day of September, 1931, and presented at the trial, having been first duly sworn, testified as follows:

Direct examination.

Read by Mr. Long:

During July, 1922, to June, 1924, inclusive, I was the distributor of automotive equipment and supplies. I am familiar with Weed chains which is one of the articles that we sold in our business. We were jobbers and engaged in that business in the taxable period in Cincinnati. We sold Weed chains during that period and kept them in stock also. We carried practically all sizes from 30 x 3½ up to 42 x 10 and those sizes were used on any sort of a motor-powered vehicle having rubber tires such as automobiles, trucks and

tractors. During that period we furnished quotations to the municipalities on tires, also bids on tire chains upon request. The municipalities would ask for bids on tire chains and as a rule they specified so many sets of Weed chains. I think they said 1,000 sets more or less of Weed chains or equal. During that period there was not on the market and we did not handle any other tire chains than Weed chains. At the present time there are other chains on the market but during the taxable period there was not any other tire chains on the market, to my knowledge. I responded to those bids and quoted prices on the different bids asking us to furnish the list price on all sizes and the name or discount so they could arrive at a net price for [fol. 292] any size which they wished to purchase. In some instances we got the business as a result of that notice. During that period we sold to the municipality different sizes of Weed chains. A person coming into our place of business would just ask for the sizes of Weed chains and we would furnish those sizes. Some fellows would ask for Weed chains for trucks. If they knew what size they wanted they would come in and ask for any size that happened to fit their wheel but sometimes they would state that they wanted them for trucks, certain sizes to use on trucks. If it was for a truck, they would ask for a truck chain. A truck chain and a tractor chain would be the same. A request for a tractor chain and another request for a truck chain, both requests would be supplied from what we termed our truck line of chain. That is what we would sell a man asking for a tractor chain. For instance, if he would ask for a 42 x 9 tractor chain we would sell him a 42 x 9, what we term truck chain, they could be used in that way. During the taxable period I saw the use of Weed chains on fire apparatus here in the city, but I can't remember having noticed any being used on tractors. Prior to that period I saw Weed chains used on ice sleds, but during that period I did not see Weed chains used on ice sleds or anything of that kind. It was possibly four years prior to the taxable period. I saw them at Columbus, Ohio.

Cross-examination.

Read by Mr. McMahon:

If a person came in and asked for a pair of chains for a Ford automobile during 1922, 1923 and 1924 we would give

[fol. 293] him a pair of 30 x 3½ Weed chains, and if he asked for a chain to fit his Buick, I don't remember the size they used at that time, but I would give him Weed chains. If he asked for a Buick, Lincoln, Cadillac, I knew the size he wanted and would give him a size and type of chain to fit that car. If we did not know the size we would go out and look at the car. During the taxable period we did not have a list of sizes, but in the last few years tire companies have prepared such lists. We sold a lot of chains in this territory in 1922, 1923 and 1924 for use on automobiles and trucks owned by private individuals, companies, corporations, etc. As a matter of fact, the big bulk of our sales was for automobile and truck use.

HENRY SCHNEEMAN, a witness, whose deposition was taken on behalf of plaintiff, at Cincinnati, Ohio, on the 4th day of September, 1931, and presented at the trial, having been first duly sworn, testified as follows:

Direct examination.

Read by Mr. Long:

During July, 1922 to June, 1924, inclusive, I was fire engineer for the Concinnati Fire Department and have been in that position since 1918. My duties were to look over the apparatus when it came in and see that all equipment is with the apparatus, that's counting everything I have in this book. A set of skid chains came with the apparatus which [fol. 294] we still have at present. Those chains were Weed chains. When the streets become slippery in Cincinnati we have a signal 3-6 for every piece of fire apparatus, meaning, put on Weed tire chains. We have a man who stands watch from nine o'clock at night until a quarter past six in the morning. If that signal comes in over our ticker he gets the engineer or driver of the truck down and in turn they take one or two other men to put on the chains. Lots of times we put them on three times a day. They are put on rubber tire wheels with 110 pounds of pressure. We put Weed chains on the combination hose and pumper. That pumper is in fact a four wheeled truck. We also have a service truck with a tractor in front that has six wheels on it. That is what we call a service truck. We put Weed chains on that

truck and did during this period. We have no other vehicles in our house there outside of those two. I know of other equipment in the Fire Department using Weed chains, such as touring cars, like Harry says, it is a roadster for the Marshal's use. Outside of my department I have noticed Weed chains used on the patrol wagon in Cincinnati in the Police Department. I have not seen Weed chains used on tractors in the country. We used Weed chains from the time we got a heavy frost until there was no more frost, say, the latter part of October to March and even April when we had some hard rains. We have awful hills to go up and down and if they have bad weather up on the hill from the 24's, they will call us up or we call them and ask "How's the streets up there" and they will say "pretty bad." Then [fol. 295] we don't wait for the 3-6 signal. We put the chains on ourselves without asking any questions for the reason that if we ruin any apparatus that house is responsible for it. In the downtown district it doesn't take long before the ice is all gone but on the wide hills it is too hilly and slippery and we took no chances. We never used those chains after heavy rains in the summer during 1922 and 1923. We had pneumatic tires on the 750 gallon pumper and the 1,000 gallon had solid tires which were rather slippery. The Police Department were using chains which I imagine were the same as we used because the City generally buys them in bulk and distributes them to the Fire Department and Police Department. We used the pumper during 1922 and 1923 with Weed chains on the wheels.

Cross-examination.

Read by Mr. McMahon:

As a matter of fact the only time we used chains in connection with our fire equipment during 1922, 1923, and 1924 was inclement weather, that is, when the weather conditions required their use we used them. As a matter of fact we used our equipment the greatest part of the time without chains in dry weather.

Redirect examination.

Read by Mr. Long:

There wasn't very much dry weather from October to the first of April.

Recross-examination.

Read by Mr. McMahon:

During the taxable period we used those chains every day from the first of November to the first of April if the [fol. 296] weather was had but I couldn't say if it was bad every day in 1922, 1923, and 1924. We used them the majority of times in each of those years, that is, the majority of times we had bad weather. We did not use them every day.

Redirect examination.

Read by Mr. Long:

We had bad weather the majority of times during those months.

JOHN P. EWALD, a witness, whose deposition was taken on behalf of plaintiff, at Louisville, Kentucky, on the 5th day of September, 1931, and presented at the trial, having been first duly sworn, testified as follows:

Direct examination.

Read by Mr. Long:

During July, 1922 to June, 1924, I was Master Mechanic for the Louisville Fire Department and have been since 1917. My duties were overseeing repairs of apparatus for the Fire Department and keeping them in proper condition to fight fire. I know all and have seen Weed chains during the taxable period. I had them placed on the rear wheels of the different pieces of apparatus to keep them from skidding. We used them on the pumper mounted on a regular motor vehicle. Some of them had pneumatic tires and some solid tires on which we used chains in bad weather, such as

[fol. 297] snowy weather or sleety weather. We also used chains on a Fordson tractor used in pulling an old style fire engine. We used them on hook and ladder, not on aerial trucks. We got that Fordson tractor during the taxable period. Plaintiff's Exhibit 1 is a true representation of the tractor that we used during that period. We still have that tractor in our Department, having made some changes like putting a windlass on it. We used Weed chains on the tires of that particular tractor during the taxable period to keep them from skidding and also for traction to help pull out of the mud. I think the fire engine shown in that picture has been scrapped. That tractor was put in the house December 20, 1922.

Plaintiff's Exhibit 447—(Formerly Plaintiff's Exhibit 1)—Photograph of Tractor drawn fire engine, as identified by the witness offered and admitted in evidence.

During the taxable period I saw Weed chains used on the car operated by the Chief and at that time the car which I myself used was equipped with Weed chains.

ALFRED WALLSMAN a witness, whose deposition was taken on behalf of plaintiff, at Louisville, Kentucky, on the 5th day of September, 1931, and presented at the trial, having been first duly sworn, testified as follows:

Direct examination.

Read by Mr. Long:

During July, 1922 to June, 1924, inclusive, I was machinist in the repair shop of the Louisville Fire Department. [fol. 298] I became connected with that Department in 1917 and am now foreman of the Department. I was familiar with the apparatus used in that Department during the taxable period and know what a Weed chain is. Weed chains were used in the Fire Department on the apparatus during that period, such as pumping engines, hook and ladder and hose wagons, Fordson tractor, Chiefs and Battalion Chiefs' cars. Plaintiff's Exhibit 1 is a Fordson tractor pulling an old steam fire engine. We took that tractor into the service in December, 1922, and still have it. I have seen it equipped with Weed chains during the tax-

able period. We use that tractor now in towing out of commissioned apparatus and pulling mired apparatus out of the mud. Occasionally in performing that service we use Weed chains on it. I won't state positive that I have seen other tractors in Louisville or elsewhere equipped with Weed chains. I myself have used this tractor in pulling apparatus out of mud holes. On one occasion I know positive was on Brook Street north of Adair in Louisville, Kentucky, where we had a hook and ladder mired in the mud and used the tractor with Weed chains on to pull it out.

Cross-examination.

Read by Mr. McMahon:

By cars I mean automobiles such as the roadsters and touring cars used by the Chief and Battalion Chief. I have seen a lot of automobiles and trucks using chains about the City during the taxable period. There was a good many more of those automobiles and trucks using chains than there were tractors around Louisville.

[fol. 299] JULIAN EDWARD GRIESHABER, a witness, whose deposition was taken on behalf of plaintiff, at Louisville, Kentucky, on the 5th day of September, 1931, and presented at the trial, having been first duly sworn, testified as follows:

Direct examination.

Read by Mr. Long:

During July, 1922, to June, 1924, I was in the city sales and stock room of the Louisville Auto Supply Company, Louisville, Kentucky. Our business was equipment and accessories. We were jobbers and sold Weed chains during that period by sizes. If a person came in to our place of business and asked for a certain size of tractor chain, we would ask him if 40 x 12 or what and if single solid, we would give him single solid. If single pneumatic we would give him single pneumatic size. If a person followed him and asked for truck chains of the same size as the size asked for, if he buys a solid or single pneumatic we would get it out of the same barrel of the same size. We go entirely by

sizes. Those chains were usable either on trucks or tractors of the same size tire. We did not sell tractors nor trucks. I have assisted in putting on these chains for customers. We would go out and try them on and see if they fit. In a lot of cases we would have to make them fit; that is, cut off lengths, possibly. We did that with either trucks or tractors, whichever the case may be and made no distinction in that respect during the taxable period or before or after that period.

[fol. 300] Cross-examination.

Read by Mr. McMahon.

When I say that chains could be used on trucks and tractors alike during the taxable period I mean like sizes could be used on either a truck or a tractor, provided the tires of the truck or tractor were of the same size. I sold lots of chains during that period for use on automobiles. The big majority of them were sold for truck use. We sell a chain that is adaptable for use on a Ford automobile. They do not use the same size of that *same size of* chain on a truck or a tractor. I am not in a position to answer anything about the number of automobiles and trucks in use in our trade territory during that period as compared to the number of tractors in use. I was not about the streets every day but was inside practically all the time. I came out in the evenings and went there in the mornings. Sometimes I walked and sometimes I rode in a street-car. I do not recall whether tractors were operating back and forth, pulling people to work, on the streets of our city during that period. Some automobiles were passing the street-cars now and then as I proceeded to and returned from the office. During that period trucks and tractors required the same chains as automobiles. Automobiles take a little lighter chain and trucks and tractors required a heavier chain. I think the size of the chains would be about equal for the amount used on passenger cars and the amount used on trucks, that is, there would be about the same number of sizes for tractors, trucks and passenger cars. All makes of [fol. 301] automobiles did not require the same size chain. All trucks did not require the same size chain. During that period the ordinary Ford roadster used several different sizes of chains. I think they used 3½ and 3-inch. If a cus-

tomer asked for a chain for his Buick sedan I gave him the size it was equipped with, which would fit it and it if was not equipped with any chain I would give him the size the tire was stamped. We did not fit the tire on his wheels, we gave him a chain that would fit the tire. I am not positive but I imagine the automobile and internal combustion tractor came out about the same time. The automobile and truck came out—of course, in proportion, the passenger cars were more numerous than the truck, one came out about as soon as the other. I could not say the passenger cars were first, that is before my time. I started work about 1915. The automobile is evidently older than I am and there was a lot of tractors out, we sold for, when I started to work.

JOHN G. GOSS, a witness, whose deposition was taken on behalf of plaintiff, at Louisville, Kentucky, on the 5th day of November, 1931, and presented at the trial, having been first duly sworn, testified as follows:

Direct examination.

Read by Mr. Long:

During July, 1922, to June, 1924, inclusive, I was and still am Superintendent of Public Parks, Louisville, Kentucky. I know of Weed chains and have used Weed chains in my [fol. 302] business as park superintendent. I used them during the taxable period on trucks, police cars and tractors. Plaintiff's Exhibit 2 represents some road equipment belonging to the Park Board which was used during the taxable period. The particular machine on which Weed chains are shown is a McCormick-Deering tractor pulling a rock spreader. Plaintiff's Exhibit 48 (formerly Exhibit 2) as identified by the witness—photograph of McCormick-Deering tractor with Weed chains pulling rock spreader, as identified by the witness, offered and admitted in evidence. We did not own that equipment during the taxable period but acquired it about two years ago. We used chains on tractors similar to that before. The tractor represented in this picture is drawing a drop-bottom wagon belonging to the Park Board. I have seen that particular tractor with chains on the tires used by the Park Board during the tax-

able period. Plaintiff's Exhibit 49—photograph of McCormick-Deering tractor with Weed chains pulling drop-bottom wagon of the Louisville, Kentucky, Park Department, offered and admitted in evidence.

ELMER H. BARNUM, a witness, called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Swindler:

During July, 1922, to June, 1924, I was connected with the [fol. 303] Danbury Fire Department of Danbury, Connecticut. During that period we had a Webb-Pope fire apparatus vehicle which came equipped with 34 x 4 tires on each of the four wheels. The department always used Weed chains during bad weather on that vehicle while I was with the department. That vehicle was manufactured by the Pope Manufacturing Company of Hartford, Connecticut, and was used during the taxable period.

Cross-examination.

By Mr. McMahon:

The fire apparatus on that vehicle was mounted on a regular Pope-Hartford chassis with a special body on it or a hose wagon or a hose truck. I couldn't say whether that was an automobile chassis or a truck chassis. It was delivered to the City of Danbury as a fire apparatus but if they used the same chassis or changed it I couldn't say. It had the same identical engine that the pleasure vehicle had and the hood was the same and the radiator was the same.

WILLIAM C. ETTERSHANK, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Swindler:

During July, 1922, to June, 1924, I was in charge of the general accounting records of the American Chain Company

as general accounting manager. In that position I handled [fol. 304] all accounting matters and am familiar with the books and records of that company for that period. My duties required me to account each month to the Government for Excise tax paid on tire chains. The tax was paid on the last or 30th day of the following month covering the previous month, to the Collector of Internal Revenue at Hartford, Conn. I looked after the Excise tax matters and the payment of tax for such company.

Q. Will you state whether or not any part of the Excise tax involved in these suits was ever collected directly or indirectly from the purchasers of the chains sold during the taxable period?

Mr. McMahon: The Government interposes an objection to the question for the reason that Section 424 of the Revenue Act of 1928, vests certain specified discretionary powers in the Commissioner of Internal Revenue which this Court is without jurisdiction to determine or review. Such evidence is immaterial to the issues in this case.

The Court: How do you claim this is material under the issues?

Mr. Swindler: If your Honor please, it has been held in the Boyle Valve Company v. United States, a case in the Court of Claims, as well as the Jefferson Electric Company in that Court, and more lately, in November of 1930, I believe, by the Federal District Court of Indiana, sitting at Indianapolis, that this question as to whether the tax is [fol. 305] directly or indirectly collected from the purchaser is in issue, that it should be covered by proof before the Court in an action such as we have here for the recovery of Excise taxes. Under those authorities we tender this evidence and feel that our tender should be accepted.

The Court: To what paragraph of the complaint does that apply?

Mr. Day: Paragraph 5, your Honor.

The Court: Have you the section there, as to that?

Mr. McMahon: Yes, your Honor. The Willard Storage Battery decision. This paragraph as to that decision covers it.

The Court: 424?

Mr. McMahon: Subdivision 2 of Section 424.

The Court: If I understand the contentions of opposing counsel correctly, it has been established satisfactorily that

the Commission of Internal Revenue is vested with sole jurisdiction to pass on the issues that might be raised under Subdivision 2 of Section 424?

Mr. Swindler: I have not yet called the court's attention to the ruling of Judge Thomas, of this jurisdiction, denying that contention for purposes, I believe, that are material at present.

Mr. McMahon: I might say, your Honor, that since Judge Thomas' decision, this Willard decision has been made.

[fol. 306] Mr. McMahon's objection at the bottom of page 667 (formerly 314), of this record, read at the request of the Court.

The Court: Objection overruled.

Mr. McMahon: Note an exception. If the Court please, for the purpose of preserving the record, we would like to have the record show that this same objection should be written out by the reporter to each question asked the witness, calling for evidence as to whether or not this tax was passed on directly or indirectly, in order to avoid confusion.

Mr. Cohen: I think it would be well, if the Court please, that this shows that the exception on this point is granted to each of the three cases which are being tried, as this is a very important point.

Mr. McMahon: We have no objection to the record showing that.

Mr. Long: You do not have to repeat it again. The stenographer will insert it.

Mr. McMahon: That's it.

Last question on page 667 (formerly 314), of this record read by the reporter.

A. It was not. During 1919 I was in the capacity of general accounting manager of the American Chain Company and had to account to the Government for all Excise taxes paid. I made them up myself for a while.

Q. Now, will you state what action the company took with respect to these Excise taxes at the inception of the tax in 1919?

[fol. 307] Mr. McMahon: The Government interposes an objection to that question for the reason that section 424 of

the Revenue Act of 1928 vests certain specified discretionary powers in the Commissioner of Internal Revenue which this Court is without jurisdiction to determine or review. Such evidence is immaterial to the issues in this case.

The Court: Overruled.

Mr. McMahon: Note an exception.

A. As I recall it, the Excise tax became effective around February 24, 1919. For a period of about 3 weeks we billed our customers at the regular price of chains—that is the same price they were in the prior period before the tax became effective and I can illustrate that best by saying that if the price of the chains was $10.00, and we stated that specifically on the invoice, that the price of the chains was $10.00 and also, underneath that, was shown 5% Excise tax, the 50¢ making a total of $10.50. That continued for a period of about three weeks, at which time——

The Court: Do I understand that during that period of three weeks, did the customers pay the tax?

A. I am coming to that now, your Honor. For three weeks, from the nature of these invoices, we passed the tax along. At the end of the three weeks' period our company decided to change its policy and to absorb the tax themselves as an expense and credit memos covering the tax pre-
[fol. 308] viously charged to the jobbers were forwarded to all customers thereby cancelling the amount of tax we had previously charged to them and those credit memos were actually posted to the customers' accounts on the Accounts Receivable Ledger.

By credit memo I mean that if a man bought a pair of chains on February 24, 1919, and he was charged $10.00 and also 50¢ for the Excise tax, making a total of $10.50, the credit memos that I am referring to, would represent the 50¢ Excise tax that we previously charged to him during that three weeks' period.

Q. After the three weeks' period did your company, at any time, show the selling price and tax separate on its invoices?

Mr. McMahon: The Government interposes an objection to that question for the reason that Section 424 of the Revenue Act of 1928, vests certain specified discretionary powers in the Commissioner of Internal Revenue which this Court

is without jurisdiction to determine or review. Such evidence is immaterial to the issues in this case.

The Court: Overruled.

Mr. McMahon: Note an exception.

A. No.

Q. Did your company, throughout the taxable period, continue to absorb, and pay, the tax?

Mr. McMahon: The Government interposes an objection [fol. 309] to that question for the reason that Section 424 of the Revenue Act of 1928, vests certain specified discretionary powers in the Commissioner of Internal Revenue which this Court is without jurisdiction to determine or review. Such evidence is immaterial to the issues in this case.

The Court: Overruled.

Mr. McMahon: Note an exception.

A. We did.

Q. Did you at any time add to or include any of the tax here in controversy in your production costs?

Mr. McMahon: The Government interposes an objection to that question for the reason that Section 424 of the Revenue Act of 1928, vests certain specified discretionary powers in the Commissioner of Internal Revenue which this Court is without jurisdiction to determine or review. Such evidence is immaterial to the issues in this case.

The Court: How is that?

Mr. Swindler: In the opening statement of counsel he contended that sometimes such tax was included in the production costs and thereby it was passed on. That is as I understand it.

The Court: Overruled.

Mr. McMahon: Note an exception.

A. We did not.

[fol. 310] Q. Did your company, at any time, increase its selling price of tire chains on account of the taxes here in controversy?

Mr. McMahon: The Government interposes an objection to that question for the reason that Section 424 of the Revenue Act of 1928, vests certain specified discretionary powers in the Commissioner of Internal Revenue which this Court is without jurisdiction to determine or review. Such evidence is immaterial to the issues in this case.

The Court: Overruled.

Mr. McMahon: Note an exception.

The Court: Exception.

The Witness: This is confined strictly to the taxable period?

Mr. Swindler: Yes.

A. We did not increase our selling price.

Q. Did your company, at any time during the taxable period, show the tax on invoices of tire chains as an item separate from the price of said tire chains?

Mr. McMahon: The Government interposes an objection to that question for the reason that Section 424 of the Revenue Act of 1928, vests certain specified discretionary powers in the Commissioner of Internal Revenue which this Court is without jurisdiction to determine or review. Such evidence is immaterial to the issues in this case.

[fol. 311] The Court: Overruled.

Mr. McMahon: Note an exception.

The Court: Exception.

A. No.

(Plaintiff's Exhibit No. 50—Department of Agriculture List, showing number of tractors manufactured and sold during 1909 to 1928 offered and admitted in evidence.)

WILLIAM C. ETTERSHANK, a witness, recalled by plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Day:

I have prepared a compilation of the toal amount of chains sold during the taxable period in question and the amount of tax paid to the Government upon those sales, and now produce it.

Plaintiff's Exhibit No. 51 (for identification), compilation of taxable sales during period July 1, 1922 to June 30, 1924, inclusive.

In explanation of this compilation and what the figures contained in such compilation represent, I desire to state:

This covers the period July 1, 1922 to June 30, 1924, and shows, in the first column, the amount of excise tax originally paid to the Collector of Internal Revenue at Hart-
[fol. 312] ford, Connecticut, on tire chains and miscellaneous other items. The second column represents the amount of refund received from the United States Government on cross chains upon which we previously paid the tax and the Government refunded that money to our company. I have thereby reduced the original amount of excise tax paid by the amount of the refund, which equals the excise tax claimed as the refund and the original claims submitted by our company. That is column three. These claims for refund were made up very quickly to protect ourselves against the Statute of Limitations. It was impossible, at that time, to throw out other items which we are now excluding from that claim, which consists of column four—pliers; and column five—adjusters. We excluded pliers, which is a plier manufactured by our company for the purpose of cutting the links of tractor chains and tire chains, which have been in evidence throughout. Adjusters are also used on tire chains, consisting of four pieces of chain with a hook and a spring which more or less tightens the chain. The emergency units are a piece of chain varying in length, which are wrapped around the tire. A blow-out chain is more or less similar to a blow-out patch. It consists of a chain and is used for wrapping around the tire so that in case you have any trouble it might carry you a few miles farther.

Jacks: That represents a jack made by our company for lifting purposes. It is worked on a chain and was more or less associated with trucks and fire engines, etc. Now, in making up that claim, originally those items were included. Therefore, for the purpose of the Court, I have deducted
[fol. 313] the total sale of those items and capitulated the tax of five per cent on certain sales, reducing our claim to an amended tax claim, which represents the excise tax paid solely on tire chains of all sizes. In order to show the taxable period involved in each of these three cases, I have divided Plaintiff's Exhibit No. 51 (for identification), into three different periods: one from July to December, inclusive, of 1922; one from January to December, 1923; and one from January to June, of 1924. The manner and

method of arriving at the figures in all three cases is exactly the same.

Plaintiff's Exhibit No. 51 (for identification), offered and admitted in evidence as a full exhibit.

I have prepared a compilation showing the number of different sizes of chains sold and the price received for the same and the amount of tax paid on the same, which I produce.. There are sixteen pages to this compilation as one exhibit.

Plaintiff's Exhibit No. 52 (for identification)—compilation showing number of different sizes of chains sold by the plaintiff and price received during the taxable period in explanation of the figures and various schedules included in this exhibit and the method which I arrived at these figures.

I might state: The excise tax was based on the sales value of tire chains and was paid in the subsequent month. [fol. 314] This sheet, covering the period July 1, 1922 through December 31, 1922, covers the quantity of pairs of Weed chains shipped during that period. The number of chains was taken from a card record which was a cumulative record of the total shipments by monthly quantities. The information from which these quantities were posted was taken from records of the company. In other words, copies of invoices that were forwarded to the customer. Due to the fact that this record included chains shipped for export and other non-taxable purposes, it was necessary, therefore, to eliminate the number of sales by size, shipped or sold for those purposes. Bringing down the figure in sales by sizes, which represents the actual number of pairs of chains by size, shipped and sold by our company, and upon which an excise tax was paid—due to the fact that the excise tax was paid on the total sales value of all kinds of chains, it was necessary to extend the quantity of each class and size by the selling price of that class and size existing at that time. The figure so arrived at, or the sales figure, would be in excess of the sales amount upon which our company paid the excise tax, for various reasons. For instance, there were certain adjustments made in correcting errors of pricing and extensions which exist in any organization. There were freight deductions made from cus-

tomers' invoices, cash discounts and rebates, and other adjustments of a similar nature. Therefore, knowing the amount of the tax that our company paid each month and the amount of the taxable sales each month, we reduced the gross sales down to the net sales on a percentage basis, which difference was very small. This adjustment we made [fol. 315] affects this report monthly by class and by size. Therefore, the total amount of excise tax paid, as shown on Exhibit No. 51 agrees, with the exception of maybe one dollar or two, with the excise tax paid by our company. Taking, for example, on the first page, the Weed 31 x 4 chain—it shows a quantity in pairs, 28,776. The next column is a Weed heavy chain of the same size of which we shipped 697 pairs. The next column is motorcycles, of which we did not ship any of that size. The next is a De Luxe chain of the same size, which is identical with these others, with the exception that the cross chain is a little heavier and of different construction. The next column represents the item of Rid-O-Skid, of the same size. That shows a difference of Rid-O-Skids, 12,839 or a total of sets of Weed heavy Motor Vehicle De Luxe Rid-O-Skids, size 31 x 4, totaling 83,129 pairs. In the next column the various headings represent sales values. By multiplying 28,776 pairs, under column one sets by the sales price in existence at that time, we get a sales value under the Weed column—$72,757.34 which is nothing more than the quantity, times the sales price in existence at that time. The same procedure follows through in respect to the other items—Weed Heavy, 697 pairs, times the sales price will give us a total sale of Weed Extra Heavy of $2,432.09. Motorcycles I will skip, because you do not wish it.

The De Luxe shows 40,817 pair, multiplied by the unit sales price which will give you a total sales value of $112,-308.19. Rid-O-Skid, in quantity of 12,839 pairs, multiplied by the sales price in existence at that time gives us a total [fol. 316] sales value of Rid-O-Skids of $18,022.66 or a total sales value of the various class of 31 x 4 size of $205,520.28. Inasmuch as that is the sales value we have multiplied that by the excise tax in effect at that time, which was five per cent, and the next column represents the excise tax paid on the quantity of 31 x 4 size of chains and the amount of the tax is $10,276.01, covering that item.

The first page of Exhibit 52 covers 4 classes of chains, which, for convenience, have been grouped on one sheet. Sheet number two, you will notice, has the marking "Single Pneumatics" in the upper left-hand corner. The same method in arriving at the various figures shown on that sheet was used as explained under the previous sheet. The next sheet, you will notice, has, in the upper left-hand corner, the marking "Single Solids". It shows the single solid by size and the excise tax is arrived at in the same manner as I previously explained on the first sheet. On the next sheet you will note in the upper left-hand corner, is the marking "Dual Pneumatics" by size. The same method in arriving at the figures on this sheet was used, as previously explained, covering the first sheet. The next sheet and last sheet cover "Dual Solids" tire chains, by size and the figures appearing on that sheet were arrived at in the same manner as explained, covering Sheet number one.

The method of arriving at the figures, throughout the entire three periods, is practically the same, with the exception of one period there may be more adjustments than in another period but the method is exactly the same and the resultant figures cover the same class of items.

[fol. 317] That is true also of the period January 1, 1924 to July 1, 1924.

Mr. Day: Now we offer this exhibit.

Mr. McMahon: The Government objects to the offer of Plaintiff's Exhibit Number 52 (for identification), as not the best evidence obtainable; that it does not reflect the sales accurately by month; constitutes reconstructed tax figures by the percentage method and shows a portion of the time paid on a 1/21st basis. The evidence of specific sizes sold in each month is not in issue and the provisions of Section 424 of the Revenue Act of 1928 precludes recovery regardless of the non-taxable claims of the plaintiff. Under the pleadings in issue made in this case, the question of recovery and specific sizes of chains sold, is not in issue and under the provisions of Section 424 of the Revenue Act of 1928, there are vested certain discretionary powers of the Commissioner of Internal Revenue which this court is without jurisdiction to determine or review.

Mr. Day: May it appear, for the record, Mr. McMahon, that the representatives of the Government have had op-

portunity to examine the originals from which these exhibits have been compiled?

Mr. Max E. Hoyt, representing the Bureau of Internal Revenue:

Your Honor, we made a spot check of certain months and portions of periods from sales invoices which the company [fol. 318] had and did the same with some of their control cards and I think we have thoroughly familiarized ourselves with the method or methods which they have used in reconstructing this tax and while there are, of course, some small discrepancies, in the figures, I am authorized to accept those figures definitely, subject to the approval of the Commissioner of Internal Revenue.

The Court: I understand then, that the Government has had an opportunity to examine the original records of the company from which this compilation is made?

Mr. McMahon: If the Court please, that is the distinguishing feature existing between the original records and the records from which this compilation is made. That is the reason for the difficulty in answering your question. If you limit the question to the question of the records from which the compilation is made——

The Court: Have the gentlemen had opportunity to examine such of the records of the plaintiff as they desire in this case? Has the defendant had this opportunity?

Mr. Hoyt: We have.

The Court: I will overrule the objection except insofar as it is based on the claim that the compilation offered is in turn based on the matter of expenditures. I confess that the evidence is in such a state that I feel unable to make a final ruling on that part of it, and the Court would suggest that, if they can do so, counsel explain more fully, through [fol. 319] the witness, the features of the compilation to which that particular objection is directed.

Mr. McMahon: Note an exception.

I am a trained accountant and my position was in charge of the accounting system of the American Chain Company. I used the percentage method in determining the net price for a specific item of chains each month because the number of invoices during this taxable period was about

350,000. When the excise tax was originally paid, that only occasioned an adding machine for computing tax on the total sizes of Weed chains regardless of class or of size and it was a very small job in arriving at the amount of tax. In the time permitted to produce these figures in a manner showing the exact sizes, the exact sales and exact tax paid by month, that would take about three months' time, but our company knew exactly the number of pairs of tire chains of a given class and a given size that were sold and those records were taken from copies of customers' invoices and the same information from what these figures were taken the excise tax was based on. We can readily see that if we issue a credit memo for an error in an extension of $5.62, you will have thirty or forty different kinds of pairs of chains affected. You would have to take $5.62 and divide it into thirty or forty sizes. We had a cash discount which was allowed our customers not on a specific size of the chain, but on the total amount of the invoice. Again, that cash discount would have to [fol. 320] be prorated by classes and by about fifty or sixty sizes, each month and the tax figures and the interest figure. We also have the item of freight. Where the total quantity of tire chains of various sizes may equal one thousand pounds the freight rate is $2.60 per one hundred pounds. The freight was deducted in its entirety from the total sales values of all class of chains. There again, the amount of the freight would have to be applied against the various styles and sizes of each invoice for each month. I did find, however, that the amount of these adjustments which I am covering amounted to approximately six per cent of the total adjustments made which were six per cent of the total sales so, therefore, these figures, from my viewpoint, represent an efficiency of ninety-four per cent. If you take the sales for a given month—we will say that the total sales for a given month were one hundred dollars. Taking a concrete figure, the net amount on which we paid the tax was ninety-four dollars. There would then be six dollars in that hundred which would represent these various allowances which we were unable to separate against each particular size of chain. Now, in applying that percentage, we would take, for instance, one particular size of chain and ascertain what the total sales price of that type of chain was—one dollar, for instance, and this would

be actual figures, and then to determine the extent to which our sales price on that particular type of chain should be reduced to bring it down to the net price on which we pay the tax we simply took the six per cent figure and deducted [fol. 321] it and brought it down to ninety-four cents. That was done each month and by each style and each size. I think the method I followed, from an accounting standpoint, represents substantially correct procedure to the extent of ninety-five per cent. I know of no other way you could do it. I think Mr. Hoyt and I worked this up together. I mean the method.

Mr. Day: We renew our offer now.
Mr. McMahon: The same objection.
The Court: May I confer with counsel?

(Conference held.)

Mr. Day: That is all.
The Court: Do you renew your offer?
Mr. Day: Yes.
Mr. McMahon: The defendant renews its same objection.
The Court: The question is of such importance that since we have come to the time for recess I think I will consider it over recess.

I have been an accountant since 1912. I appeared before the United States Government on numerous tax cases. I have a card entitling me to practice before the United States Government, that is, the Treasury Department. I have been in Washington at least thirty times before different representatives of the Treasury Department, not only for the American Chain Company but for other companies. I assisted in the preparation of the income taxes and supervised the examination of the income tax of the American Chain Company and other companies and I have done that [fol. 322] class of work right down to the present time. I have worked on refinancing of organizations and constructive accounting of the installation of cost systems of at least a dozen companies. I do not happen to be a certified public accountant and I have never taken an examination.

At no time could the price received for individual sizes of chains during any given period, a month, six months, or a year, have been determined without resorting to a percentage figure such as I have used in my present compilation.

As an illustration, here is an invoice owing to John Smith and Company and on the invoice it covers 10 different sizes of Weed chain, 30 x 3½, 31 x 4, and various sizes. Those sizes are priced at a list price, say $5.00, $6.00 and $7.00. We multiply the number of pairs of a given size by the list off of each particular size. From that sum is deducted or deduct the freight and trade discount in effect at that time, which we will say is fifty per cent, so we take fifty per cent off the total of the sales value and not fifty per cent off of each particular size. Ffrom that sum is deducted a sum representing freight that was allowed the customer. As an illustration, the invoice is $100.00. We deduct ten dollars for freight. The customer pays ninety dollars. Now that ten dollars in freight covers freight, not on one size but on all sizes. To get the actual freight by sizes we would have to take the weight of each chain, multiply it by the number of pairs, take the total weight and find the relative percentage of each weight of an individual chain of the total and multiply it by the freight rate.

[fol. 323] The item of cash discount would be in the same category as freight. If a customer pays a bill in ten days he is allowed two per cent of the total amount and this two per cent, therefore, in real-ty, covers all sizes and the only way that can be procured is by a percentage basis, dividing the cash discount by representative values. There is another item which we call a price adjustment. There may be some clerical errors in the extension. We may have put down the wrong extensions or added the figures up wrong. In that case we simply sent a credit memo. correcting the bill and perhaps sent a credit memo. to the customer of $5.60 which may cover twenty or thirty sizes. Again, that would have to be all reworked out.

The Court: And further questions?

Mr. Day: No.

The Court: I will overrule the objection.

Mr. McMahon: Note an exception.

The Court: An exception.

Plaintiff's Exhibit No. 52 (for identification) laid in evidence as a full exhibit.

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Cross-examination.

By Mr. McMahon:

The freight could be applied through another method which would take probably three months by taking the total weight, going back through three hundred and fifty thousand invoices, as I think, perhaps, I explained. Taking the actual invoices you could allocate freight by two methods. [fol. 324] I have adopted one method and the other method would be by taking the total weight and multiplying it by the weight of each size of chain and you would have six or seven hundred thousand calculations. That is the only other method by which you could allocate that freight. There are no methods by which you can allocate the discount. There may be other items on the invoices besides chains and that would be two per cent on the invoice and the cash discount would be on money value. You have no better way of doing it. I explained the fact that the reconstructed value of chains shipped applied to Weed chains, for possibly the months of August to December 1923 and the first six months of 1924 compiled from the production control cards. It shows sales of $617,800.09, while the tax actually paid for this period forced me to reduce the taxable values of the chains shipped to $496,612.30 by the fact that those figures differ through the entire period. The first set of sheets states the quantity multiplied by the sales prices in existence at that time. Those figures were later reduced to take care of adjustments such as I have spoken about, bringing them down to the net sales multiplied by the tax which will give you the exact amount of tax paid, so that you have two sets of figures there. I don't know that it reduced the amount practically twenty per cent. The difference of $617,000 as against $496,000 for the six months period in 1924, roughly speaking, is twenty per cent. The items that enter into the difference between those figures, that causes the reduction, are the re- [fol. 325] bates, terms, allowances, freight, tax, and during the portion of the period, an item of 1/21st. This item of 1/21st in certain respects refers to the basis of computation of tax or the tax we paid. During the first six months period in 1924 our chains were five dollars a pair. I think during the latter part of July, 1924, or the early part of August, 1924, our selling price of those chains was still five

dollars a pair. It was our understanding that if we notified the customers that 1/21st of the above amount represented excise taxes, then the company could save five per cent of the tax payable. Then part of this excess between the $617,000 and the $496,000 is in a measure taken up, in part at least, by this 1/21st on which the tax was computed, as I stated before. If we billed a customer a pair of chains for five dollars, that constituted the amount the customer paid, say five dollars in both cases, before and after, and 1/21st of that amount represented the tax, that is what we put on our invoices. Our invoices did not state that 20/21sts or 21/21sts, minus 1/21st, equalling 20/21sts, constituted the selling price. That is not a fact. The difference is that our company never, during this taxable period, increased their prices of chains to its customers with the exception of an occasional change in price, maybe of a few sizes, but nothing to do with the excise tax. The amount the customer paid in 1922 up to the period you are speaking about, is the same he paid in subsequent period ending June 30, 1924. He paid the same amount for his chains during the first six months of 1924 that he did in the previous [fol. 326] period. If the customer paid five dollars that did not represent 21/21sts, it represented our sales price of five dollars to the customer, and we computed the tax on the basis of 1/21st on that price and stamped our invoices with 1/21st of that price which represented the tax. The customer paid the five dollars, less freight. The customer paid 21/21st, that is he paid us five dollars. I would not say that the customer paid that 1/21st, as well as the 20/21st. I simply state our invoices had the same price on as they did in the prior period when our company notified its customers that 1/21st of the above amount represented excise tax, affording our company an opportunity to save a tax on a tax and thereby reduce our expenses by five per cent. That was the purpose of the stamp. There is no question in my mind but that the customer paid the five dollars and there is no doubt in my mind but what our invoices were stamped 1/21st of that five dollars representing tax. That same condition applied during 1923 with respect to this 1/21st, as I recall it. I do not think it applied throughout the entire year. I think it applied from the latter part of July or the first part of August, 1923. I think we computed our tax on the basis of 1/21st from the

latter part of August 1923 to June 30, 1924. That period is represented in two of these suits. That would be the suit covering part of the year 1923 and the suit covering the first six months of the year 1924. I do not have the price lists with me in effect at that time, from which I made the [fol. 327] computation. I could get them. I will get them and bring them into Court.

The Court: The ruling of the Court is that if the gentleman can produce those figures without delaying the trial, he can do so, but I don't want to delay the trial.

Mr. Day: Your Honor, Mr. McMahon has no objection so far as identification is concerned to Plaintiff's Exhibit 53. This is a recapitulation of these figures on each of the sizes with the interest computed from the last payment day up to October 27. That is simply for the purpose of showing the jury on each size the amount plus the interest with the date from which it was computed, and in each of these periods. Take, for instance, the first period, which would be from June 30, 1922, to January 1, 1924, all payments were made monthly. That is, the shipment of July would be paid on or before the last day of August. In computing the interest, we have computed all our interest from the last interest date of payment, which would be January 31, 1923, so that is all in favor of the Government, and I understand Mr. Hoyt says, so far as the last day method of computing interest is concerned, there is no question about it, therefore I offer Plaintiff's Exhibit 53—recapitulation of figures on each size of chain sold during the taxable period with interest computed thereon.

Mr. McMahon: The Government interposes the same [fol. 328] objection to the offer of this exhibit as it interposed to the offer of Exhibit 52.

The Court: The same ruling, admitted.

Mr. McMahon: Note an exception.

Mr. Day: We have nothing more to offer, we rest.

MOTION TO DISMISS

Mr. McMahon: The defendant renews its motion to dismiss, heretofore made in this case, and moves the Court to dismiss each of the cases, numbers 3360, 3371, and 3421, on each of the following grounds:

The provisions of Section 424 of the Revenue Act of 1928 deprive the plaintiff of its privilege of refund in each of these cases for the recovery of manufacturer's excise tax paid or collected under the provisions of Section 900 (3) of the Revenue Act of 1926. 2. The provisions of Section 424 of the Revenue Act of 1928 deprive the plaintiff of its privilege of instituting and maintaining each of these actions for the recovery of manufacturer's excise tax paid or collected under the provisions of Section 900 (3) of the Revenue Act of 1921 subsequent to May 29, 1928, the effective date of such act. 3. The provisions of Section 424 of the Revenue Act of 1928 vest certain specified discretionary powers in the Commissioner of Internal Revenue, which this court is without jurisdiction to determine or review. 4. The provisions of Section 424 (a) (1) of the Revenue Act of 1928 limit the jurisdiction of this [fol. 329] court to hear and determine the issues in each of these actions for the recovery of manufacturer's excise tax paid and collected under the provisions of Section 900 (3) of the Revenue Act of 1921, to actions instituted prior to April 30, 1928. 5. The provisions of Section 424 of the Revenue Act of 1928 provide a remedy for the recovery of manufacturer's excise tax paid or collected under the provisions of Section 900 (3) of the Revenue Act of 1921, which is exclusive of all other revenues. 6. The provisions of Section 424 of the Revenue Act of 1928 preclude recovery in this action for the recovery of manufacturer's excise tax paid or collected under the provisions of Section 900 (3) of the Revenue Act of 1921 regardless of the nontaxable claims of the plaintiff.

The Court: The motions are denied.

Mr. Cohen: In each case?

The Court: In each case.

Mr. McMahon: Note an exception in each case on each ground.

The Court: It may be so noted.

MOTION TO EXCLUDE TESTIMONY

Mr. Cohen: At this time the defendant, in each case, moves that all the testimony given by the various witnesses in these cases with reference to the various sizes

of chains be excluded as being incompetent, irrelevant and immaterial to the questions involved.

The Court: Motion denied.

Mr. Cohen: May we have an exception in each case?

[fol. 330] The Court: An exception in each case.

COLLOQUY

Mr. McMahon: If the Court please, I believe in view of the fact that it is our recess time that we might be able to expedite things much more if we would take our noon recess now and put all our evidence in immediately following the reconvening of the Court and give us an opportunity to assemble and get it in shape.

The Court: I thought that counsel for the plaintiff had some motions that they cared to present.

Mr. Long: We have no motions.

The Court: I have already indicated to counsel informally that the view of the Court is that under the Revenue Law controlling these actions it is necessary to consider each class and each size of chain separately and I have it in mind that when the time comes I shall be prepared to charge the jury accordingly. The plaintiff has now finished and I can't see that any evidence that the defendant can possibly offer will affect the observation and the suggestion that I want to make at this time. Feeling as I do that the triers of fact must consider each chain separately, it becomes evident that the triers of fact, in the event that they shall find for the plaintiff, will have a difficult task by way of computation. This occurred to me as the trial started. All these days of testimony, I have observed, have only increased that condition, and now, that the plain-
[fol. 331] tiff's evidence is all in, I want to say to you the view I take of it. The task required of the triers of fact, in the event that they shall find for the plaintiff, is a task for which a jury is without adequate facilities satisfactorily to perform. I confess no lack of faith in the jury system. I recognize that each party has a constitutional right to trial by jury but I do believe that if the institution of the jury is to — preserve- as a useful institution, under certain conditions it is occasionally necessary, in view of the unusual features relating to the case which

may occur, I want the parties to restrain themselves from this exercise of their constitutional rights. Conceivably every man has the right to hunt house flies with a shotgun but there are occasions when it is not a proper tool; and I suggest, gentlemen, having heard all the plaintiff's testimony, that it is the opinion of the Court that the jury, in the interests of justice, be waived in this case. The decision by the Court will necessarily give counsel every finding of facts that it could possibly have. So far as I can see, it would impair in no respect any right which it is desirable and proper to preserve for purposes of justice, and so, gentlemen, I wish to inquire whether, in view of considering the opinion of the Court in this connection, you will not waive the right to trial by jury and consent to take the case from the Jury? What do you say, Senator Long?

[fol. 332] Mr. Long: We agree to that suggestion for the plaintiff.

The Court: What do you say, Mr. McMahon, for the defendant?

Mr. McMahon: The defendant can not agree with the Court's suggestion.

Mr. McMahon: Off the record. That is what I spoke to your Honor about the other evening rather informally.

The Court: I am very obviously speaking for the record now. I want to inquire why it is that counsel of record in this case find themselves unable to accept a considered suggestion of the Court on a matter of such importance.

Mr. McMahon: The reason why the defendant desires to continue the case and the case be submitted to the jury and without the waiver of the jury is that the position of the defendant with respect to the question of whether or not the particular chains involved in this case are accessories on an automobile can be only determined in conformity with the constitutional rights of the defendant by the jury, and it also appears of record that the jury was requested in this case—the jury was insisted upon in this case by the proper officials in Washington having ultimate authority with respect thereto.

The Court: In view of that fact, the Court will venture to suggest that counsel appearing of record for the defendant forthwith communicate with his superior by telephone, [fol. 333] conveying the compliments of the Court and giv-

ing the substance of the opinion of the Court as just set forth and say that we await their decision.

Mr. McMahon: Just let me understand you correctly. I had this matter up with them while in Washington over Sunday and I told them—

The Court: I don't care to go into that, Mr. McMahon. I have refrained from any definite suggestion until I should see where the close of the plaintiff's evidence left us, and now, that the plaintiff has rested, I am satisfied that this is not a proper case for the jury and that being so, before I put it to the jury, I feel it my duty to make sure that no stone has been left unturned to make that unnecessary for the reasons that I have already stated.

Mr. McMahon: I shall communicate with the proper officials in Washington as promptly as possible by telephone and report the answer to the Court.

The Court: And come in at one thirty.

DEFENDANT'S EVIDENCE

MAX E. HOYT, a witness called by defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. McMahon:

I am Chief of Sales & Capital Stock Section of the Miscellaneous Tax Unit in the Bureau of Internal Revenue at [fol. 334] Washington, D. C. In that position I have to do with the claims for refund filed by taxpayer and in the making of investigation with respect to such claims for refund such as the investigation of articles, etc., with respect to tax classification. I conduct such investigations personally or cause them to be conducted under my supervision and instruction. My duties involve finding the facts that exist and requires a thorough investigation of any evidence which a taxpayer submits. Also an investigation of all available information and statistics in the Library of Congress or other sources of that nature, as well as investigations in the various governmental departments for assembling information pertaining to whatever subject I am working on. I caused such investigations to be made in connec-

tion with the claims filed by the American Chain Company. Defendant's Exhibit L (for identification) is a claim for refund on Form 843, filed by the American Chain Company on January 27, 1927, attached to which is a photostat copy of a letter from the Bureau to the American Chain Company under date of July 5, 1927, and a tabulation prepared on the letterhead of the American Chain Company dated January 27, 1927, apparently covering tax paid and claimed, and dates of payment, in addition to which the certification made by the Collector showing the amounts and dates of payments. I have the original claim for refund and a copy of that letter in my possession as part of the records of the Bureau of Internal Revenue and that is a true copy of such [fol. 335] records. Defendant's exhibit M (for identification) is a claim for refund on Form 843, filed by the American Chain Company, executed on August 30, 1926, in the amount of $183,365.49, attached to which is a tabulation prepared on the letterhead of the American Chain Company showing the amount of tax paid and the amount of tax claimed as refund and the dates of payment, together with a letter dated August 23, 1927, addressed by the Bureau to the American Chain Company rejecting its claim for refund. I have the original of that claim and the Bureau copy of that letter in my possession as part of the Bureau records. Defendant's Exhibit M. is a claim for refund on Form 843 filed by the American Chain Company, being executed under date of February 15, 1928, in the amount of $105,031.43, attached to which is a schedule of excise tax payments for the period January 1, 1924, to June 30, 1924, showing the amount of tax paid and the date paid, together with a letter from the Internal Revenue Bureau mailed by the Commissioner of Internal Revenue to the American Chain Company dated March 15, 1928, rejecting this claim. I have the original of this claim for refund and the Bureau copy of the letter attached in my possession as part of the files of the Bureau of Internal Revenue. The claim for refund identified as Defendant's Exhibit L is for the period July 1, 1922, to December 30, 1922. The claim marked Defendant's Exhibit M is for the period January 1, 1923 to December 31, 1923, inclusive. The claim marked Defendant's Exhibit N is for the period January 1, 1924 to June 30, [fol. 336] 1924. Defendant's exhibit L, claim for refund for period January 1, 1923, to December 30, 1923, inclusive,

offered and admitted in evidence as a full exhibit. Defendant's Exhibit M, claim for refund of the American Chain Company for excise taxes paid during the year 1923, together with data submitted to the Bureau of Internal Revenue, and letter of rejection offered and admitted in evidence as a full exhibit. Defendant's Exhibit N, claim for refund of American Chain Company for excise taxes paid during the period January 1, 1924, to June 30, 1924, together with data submitted to the Bureau of Internal Revenue and letter of rejection offered and admitted in evidence as a full exhibit. Defendant's Exhibit F is a price list and advertising circular of the American Chain Company, showing list prices in effect April 18, 1923, on Weed chains for pneumatic and solid truck tires. It has various illustrations and prices of sizes of chains in it. This exhibit was picked up and in the field and submitted to the Bureau for use in connection with this case by a revenue agent of the Bureau of Internal Revenue which he stated he obtained from the company. I am certain it came from the company because I have seen copies of these same things in the company's office. That is true with respect to Defendant's Exhibits F, G, H, I and J. In connection with my duties I made an investigation or a search of the patent records with respect to patents covering the particular chains involved in these cases. I might say at the beginning that I got all four of these copies, being Defendant's Exhibits A, B, C and E [fol. 337] from the Patent Office last week. I abstracted those exhibits from the records of the Patent Office myself. I made an investigation or search of the records of the Department of Agriculture and the Department of Commerce, and Interstate Commerce Commission, or other departments, with respect to these chains with respect to trucks, tractors, the number of such trucks and the number of such tractors used and manufactured during the periods covered by the taxable periods involved in this suit. I produce such records. Defendant's Exhibit O offered and admitted in evidence. Defendant's Exhibit P offered and admitted in evidence. Defendant's Exhibit Q offered and admitted in evidence. Defendant's Exhibit R offered and admitted in evidence. Defendant's Exhibit S marked for identification. Defendant's Exhibit T offered and admitted in evidence. Defendant's Exhibits U, V and W marked for identification and withdrawn. Defendant's Exhibit X offered and ad-

mitted in evidence. Defendant's Exhibit Y offered and admitted in evidence. Defendant's Exhibit Z offered and admitted in evidence. Defendant's Exhibit AA offered and admitted in evidence. Defendant's Exhibit BB offered and admitted in evidence.

Jury Waived

Mr. McMahon: If the court please, will the court please withhold the jury until the defendant makes a motion. In view of the fact that counsel for the defendant has communicated with the proper officials in Washington with [fol. 338] respect to the submission of this case to the court and the waiving of a jury and has been instructed by Mr. A. R. Marrs, Assistant Commissioner, that the case should be given to the court and the jury waived, consequently, the defendant at this time waives the submission of this case to the jury.

The Court: Do counsel for plaintiff agree?

Mr. Day: Yes, we agree but isn't there something more in the matter of procedure? Isn't it necessary under the federal practice that a stipulation be entered into and it must be decided by the court?

Mr. McMahon: You mean a written stipulation?

Mr. Day: I mean shouldn't that be prepared?

Mr. McMahon: It should be submitted even before the court proceeds with the case. You can complete your record now that this stipulation has been entered and filed as far as we are concerned.

The Court: Proceed on that basis. You can file the stipulation afterwards. Now what are your wishes with regard to the case? How much more have you got, Mr. McMahon?

Mr. McMahon: There is, I imagine, only Mr. Hoyt and Mr. Dodge. I am still a little confused about these exhibits. As I understand it, those are admitted in evidence?

The Court: Those that are in are in and those that are [fol. 339] out are out. Then there is no use in continuing this examination if the case is to be submitted to the court. You might explain them to the court; they are self-evident, I suppose. They are self-explanatory.

Jury Excused

The Court: Gentlemen of the jury, counsel in this case have just come to an agreement whereby they will with-

draw the case from the consideration of the jury and submit it to the court. Accordingly, in so far as this jury is concerned, the record is now closed. Jury excused.

Direct examination (cont'd).

By Mr. McMahon:

I know which was first in the point of time, the advent of the automobile or the advent of the tractor. The advent of the automobile was first in point of time compared to the advent of the tractor. I know whether or not chains were used on automobiles prior to the advent of the tractor. Weed chains were used on automobiles prior to the advent of the tractor. I know which was first in the point of time, the advent of the truck, or the advent of the internal combustion tractor. Weed chains were used on trucks prior to the advent of the tractor. As a matter of fact the chains in use on automobiles prior to the advent of the truck were redesigned and adapted for use on trucks. The chains in use on trucks prior to the advent of the tractor were redesigned and adapted for use on tractors. I [fol. 340] know whether or not the duty requirements of a tractor in its respect to the use of chains—a Weed chain—are the same as the duty requirements of an automobile with respect to the use of Weed chains. In connection with my duties as the head of the department or section which I represent I have something to do with the design or engineering features involving duty requirements as affecting design with respect to tire chains and any of these parts and accessories for automobiles as we always have to look at that element. I do not claim to be a technical engineering expert and wish to testify only with respect to the practical phases of those questions as applied to the administration of the taxing statutes.

Q. I will ask you Mr. Hoyt, if there is any difference for practical purposes between the duty requirements of a truck with respect to the use of chains and the duty requirements of an automobile with respect to the use of chains.

Mr. Day: We object, your Honor. He has taken this witness and asked him whether or not he knows the answer to that, then he asks a question which calls for an expert conclusion, based on the knowledge of mechanics

and the manufacturing operations in connection with these chains. In other words, he is simply qualifying him by his own statement. Mr. McMahon made this same objection that he hasn't shown that the witness is qualified and he is now required to qualify this witness and ask him his experience and knowledge. I think this is the wrong way [fol. 341] to prove it. I think the right way is to prove the method of uses and how they differ.

The Court: Sustained.

Mr. McMahon: Note an exception.

The Court: Exception.

Q. As a practical proposition, Mr. Hoyt, does the revolving speed of an automobile possessing chains attached to such automobile affect in any way such chains?

A. Yes.

Mr. Day: I move to strike out the answer and object to the question on the ground that he isn't qualified to answer.

The Court: Sustained. Motion granted.

I own an automobile and have traveled about the country extensively. I have seen automobiles, trucks and tractors in operation with chains and have applied chains to the tires of my own automobile. I have worn out a pair of chains and have observed the operation of passenger automobiles with chains on. I have observed the wear on those chains.

Q. Now tell us, as a practical proposition, from your observation, does the speed at which an automobile wheel turns when it has chains on it have any wearing effect on such chains?

Mr. Day: Object.

The Court: The question is if the speed has a wearing effect, Mr. McMahon.

Mr. McMahon: Yes.

Mr. Day: You haven't shown yet how he is going or on [fol. 342] what knowledge he is going to testify to that effect.

Mr. McMahon: His observation.

Mr. Day: You don't assume while he is driving the car he can watch the chains and see how fast they wear out, do you?

Mr. McMahon: He says he has observed chains.

Mr. Day: Either you must show from expert knowledge, or you must show from actual observation.

Mr. McMahon: That is just what I have shown. He has testified that he has owned a car and put chains on it and he has watched automobiles and trucks in operation.

Mr. Day: I object to that question unless and until he shows the method of observation in order to determine the result of his observation.

The Court: Sustained.

Q. What observation have you made Mr. Hoyt with respect to the use of chains on automobiles and the use of chains on trucks and the use of chains on tractors? Tell us all about it.

A. Well, of course, I have seen chains on all three types of vehicles. I have seen them in various stages of repair and disrepair, whatever you want to call it. I have also had plenty of experience with cars of my father's on which he had Weed chains and I had plenty of opportunity to observe the effect of wear on them.

Mr. McMahon: I will repeat the question. Do you want to object?

[fol. 343] Mr. Day: Object.

The Court: Sustained.

Mr. McMahon: An exception.

The Court: Exception.

W. Ernest Dodge, a witness called by defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. McMahon:

I am claims auditor for the Miscellaneous Division of the Miscellaneous Tax Unit of the Bureau of Internal Revenue. During July, 1922, to June, 1924, inclusive, I was attached to a group which issued rulings with respect to the taxability of any article submitted or inquired about with respect to the tax. As part of my duties we analyzed what is described as parts and accessories for automobiles and

classified them for taxing purposes. I am familiar with all of the parts and accessories commonly used in connection with automobiles. I have examined all makes and types of parts and accessories submitted by the manufacturers to the Bureau during the taxable period for the purpose of classifying such parts or accessories with respect to taxation. I examined tire chains submitted to the Bureau for the purpose of classifying them for taxing purposes. I make an investigation with respect to such tax classification of such articles. I know what a carburetor, valve, and tire chain are. I know nothing about the design [fol. 344] of those tire chains. I know the principle on which a carburetor works. The advent of the automobile was first in point of time compared to the advent of the tractor. The advent of the truck was first in point of time compared to the tractor. Tire chains were used on automobiles prior to the advent of the truck. I do not know definitely when the advent of the truck occurred, the war brought on its greatest development. I believe Elwood Haynes made the first practicable automobile in 1893. The advent of the tractor, which was a production of the war, was subsequent to the war, I would say, and subsequent to the development of the truck. Tire chains were used on trucks prior to the advent of the tractor. I cannot give anywhere near an accurate percentage of the number of automobiles and trucks in use during the taxable period from memory. I know which was greater. The trucks and automobiles were much greater. In determining the taxability of chains, we took into consideration all the patents we could find, Defendant's Exhibits A, B, C and E being among them.

Q. Did you classify the chains sold by the American Chain Company during the taxable periods which are involved in this suit? Answer yes or no.

A. If I remember correctly we never considered the American Chain Company's chains.

Mr. Day: He can answer that yes or no.

Q. (Last question read by the reporter.) That is, did you classify them for taxing purposes?

A. If I remember correctly we never gave a ruling to the Chain Company.

[fol. 345] Mr. Day: Just a minute.

The Court: Mr. McMahon, after all, this is a Court and to take one of your men from the counsel table and put him on the stand and then confer with him in the middle of an examination, I think passes the bounds of procedure.

Mr. McMahon: I apologize for that but I was trying to save time and I withdraw the question. That is all.

Mr. Day: No cross examination.

Mr. McMahon: Defendant rests.

DEFENDANT'S MOTION FOR JUDGMENT

Mr. McMahon: The defendant now desires to make a motion for judgment in each of these cases Nos. 3360, 3371 and 3421 which have been consolidated for trial. The defendant now tenders for filing in each of these cases Nos. 3360, 3371 and 3421 written motions for judgment.

The Court: Motions may be filed.

Mr. Day: May I ask one thing as a matter of information, your Honor, on this question of whether the case should be determined on the basis of particular sizes or not: I would rather assume that the announcement, which your Honor has made, represented the way your Honor was thinking at the present time and that you have no objection to our introducing our argument on any phase of the case.

(At this point there was further conversation between the Court and counsel, followed by the oral arguments of counsel.)

Mr. Long: The plaintiff in this case requests specific [fol. 346] findings of fact and conclusions of law.

Mr. McMahon: The defendant requests specific findings of fact and conclusions of law, and let the record show that both parties request additional time to file requests for special findings of fact and conclusions of law.

The Court: How much time do you want?

Mr. Long: Within thirty days. The plaintiff desires twenty days to file a supplemental brief and specified findings of fact, if the Court desires any suggestions on the facts.

The Court: I should be very glad to receive requests—specific requests for findings of fact or of law.

Mr. Long: For specific findings of fact or conclusions of law we want twenty days to do that.

The Court: I don't think there is any point in sending in your request for a finding before your brief. I would suggest, therefore, that each side take thirty days to file whatever they want—requests and briefs.

The Court: I will allow each side thirty days to file anything they want in the way of briefs and requests and thereafter I will allow each side a week for reply and thereafter I will give you the decision as quick as I can and I will continue matters now until the month of December.

[fol. 347] Thereafter, briefs and requests for findings of fact and conclusions of law were duly filed by both parties, and the Court, after due consideration rendered his decision in favor of the plaintiff and against the defendant, as appears from the record herein.

Thereafter, the Court entered judgment in each of the above entitled causes upon said verdict, as appears of record herein, in favor of the plaintiff and against the defendant, to all of which the defendant, at the time, duly excepted.

ORDER SETTLING BILL OF EXCEPTIONS.

Inasmuch as the rulings and exceptions specified in the foregoing bill of exceptions, do not appear in the record of each of the above entitled causes, I, Honorable Edwin S. Thomas, Judge of the said Court, after due notice given to the plaintiff herein, have settled and signed the said bill, and have ordered that the same be made a part of the record of the said cause, this 13th day of July, A. D. 1932, as a true, correct and complete bill of exceptions.

Edwin S. Thomas, United States District Judge.

Approved as to form.

—— ——, Attorney for Plaintiff.

[fol. 348] IN UNITED STATES DISTRICT COURT

Nos. 3360, 3371, 3421. Law

[Title omitted]

ASSIGNMENT OF ERRORS—Filed July 14, 1932

Now comes the defendant in the above entitled causes and files in each of such causes, the following assignment of errors upon which he will rely upon his prosecution of the appeal from the decree and judgment entered in each of such causes by this Honorable Court on the 14th day of April, A. D. 1932:

I

The United States District Court for the District of Connecticut erred in overruling each of the motions interposed by defendant and appellant in each of the above entitled causes to dismiss the original complaints filed in each of such causes.

[fol. 349]

II

The Court erred in overruling defendant's objection to the following question and in permitting the witness to answer:

"Q. Had the above sizes of Weed chains for use on automobiles or trucks any peculiar characteristics which were not identical with Weed chains for use on tractors, fire apparatus and road machines?

Mr. McMahon: The Government interposes an objection to the question for the reason the witness has not shown himself qualified to answer; it is not the best evidence; it calls for the conclusion of the witness; assumes facts to be true which have not been shown by the evidence and usurps the power of the jury.

The Court: I understand the question asks for physical differences, if any, between two chains.

Mr. McMahon: If the Court please, I can see your view of the question asked, but the question that is bothering me is: Does that lead to the question of design or does it specifically refer to particular sizes of chains. In other words the question is too general to apply to anything other

than design. Peculiar characteristics are part of design and this witness certainly isn't qualified to testify as to that.

Mr. Long: This witness is qualified to testify to design. They had to make a chain.

[fol. 350] The Court: I will allow the question.

Mr. McMahon: May I ask one question. What are 'the above chains'?

Mr. Long: The above sizes. We have had the size here—the above sizes of Weed Chains.

Mr. McMahon: Note an exception to the question ruling.

A. No, they did not."

III

The Court erred in overruling defendant's objection to the following question and in permitting the witness to answer:

"Q. Were the Weed Chains manufactured and sold by the American Chain Company upon which the taxes in this suit were paid, interchangeable for use on tractors, fire apparatus and road machines?

Mr. McMahon: The Government interposes an objection to that question as applied——

The Court: I will admit it.

Mr. McMahon: Note an exception on the ground that the witness has not shown himself qualified to answer; it calls for a conclusion of the witness; assumes facts to be true that are not shown by the evidence; it is not the best evidence and usurps the power of the jury with respect to use.

The Court: Exception noted.

A. They were."

[fol. 351]

IV

The Court erred in overruling defendant's objection to the following question and in permitting the witness to answer:

"Q. Were suitable sizes of such Weed chains manufactured and sold during the taxable periods, used generally on automobiles and trucks, interchangeable for use on tractors, fire apparatus and road machines?

Mr. McMahon: The Government interposes an objection to that question for the reason that the witness has not shown himself qualified to answer; it calls for the conclusion of the witness; assumes facts to be true that are not shown by the evidence; it is not the best evidence obtainable; and usurps the power of the jury.

The Court: Admitted.

Mr. McMahon: Note an exception.

The Court: Exception noted. You may answer.

A. They were."

V

The Court erred in sustaining plaintiff's objection to defendant's offer of Defendant's Exhibits A, C, D and E in connection with the cross examination of plaintiff's witness, William Thomas Morris (pp. 7 and 8 of attached bill of exceptions), and in excluding such exhibits:

"Mr. McMahon: Is it the rule for the defendant to offer evidence on cross examination?

[fol. 352] The Court: Unless it is otherwise admissible.

Mr. McMahon: Very well, the defendant offers in evidence Defendant's Exhibits A, B, C, D and E as identified by this witness.

Mr. Long: Now we object to them because it is not proper cross examination. Second, because outside of the Parsons Patent, the chains for which taxes are assessed and which the demand is made for the refund during this period were not manufactured under any of these patents except the Parsons patent. I don't know as to these other patents. We never had a chance to examine them.

Mr. Long: We make the objection as to all of them except the Parsons Patent and if necessary we desire to ask some preliminary questions of the witness.

The Court: Objection sustained.

Mr. McMahon: An exception on behalf of the defendant.

Mr. Long: We don't object to Defendant's Exhibit B, the Parsons Patent on any ground.

Mr. McMahon: The defendant excepts to the exclusion of Defendant's Exhibits A, C, D and E.

The Court: The exhibits so excluded will be marked for identification only."

VI

The Court erred in sustaining plaintiff's objection to the following question (B/E 9), and in not permitting William Thomas Morris, the witness, to answer.

[fol. 353] "Q. I hand you what has been marked Defendant's Exhibit A for identification and ask you to state if that exhibit marked for identification, covers the Weed patent——

Mr. Long: Now, we object to that because——

Q. Let me finish—covered the chains which you assembled with your own hands when you first began to work for the Weed Tire Chain Company?

The Court: How is that material?

Mr. McMahon: It is coming down the line.

Mr. Long: We object to it for same reasons given before. It is not proper cross examination and is immaterial, incompetent, and irrelevant to any of the issues in this case, covering chains manufactured and sold during the taxable period.

Mr. Long: On examination in chief I didn't ask you what the patent was.

The Court: I will sustain the objection to the pending question.

Mr. McMahon: Note an exception."

VII

The Court erred in sustaining plaintiff's objection to the following question (B/E 10), in not permitting William Thomas Morris, the witness to answer.

"Q. Were the differences covering the chains in construction covered by patents covering an improvement in [fol. 354] the art of manufacture as compared to the chains which you manufactured during the taxable periods?

Mr. Long: We object to that as being immaterial, incompetent, and irrelevant and having no relation to the issues involved in this case as well as not being proper cross examination.

The Court: Sustained.

Mr. McMahon: Note an exception."

VIII

The Court erred in overruling defendant's motion to strike the testimony of plaintiff's witness, F. B. Baker (B/E 11, 12, 13), covering the use of tire chains throughout the country:

"Mr. McMahon: I move to strike out the testimony of this witness covering the use of tire chains throughout the country.

The Court: Denied.

Mr. McMahon: Note an exception.

The Court: Exception noted."

IX

The Court erred in overruling defendant's objection to the following question (B/E 16) and in permitting the witness, Henry H. Heitmann, to answer:

"Q. Did these chains function as well on both vehicles or on one vehicle as on the other?

[fol. 355] Mr. McMahon: The Government interposes an objection to the question for the reason it calls for the conclusion of the witness, the witness is not qualified to answer, it assumes the facts to be true which have not been shown by the evidence, it is immaterial to the issues in this case, it is incompetent and not the best evidence and usurps the power of the jury.

Mr. Swindler: Your Honor, this witness is qualified to testify to the use of these chains both in an automobile, as alleged by the Government, and upon the fire apparatus.

The Court: I think he is. I will rule that way.

Mr. McMahon: The defendant, in this connection wishes to call the Court's attention to the fact that he is asking the witness, not if they used it, but if it functioned just as well.

The Court: This witness is qualified to answer. He is chief of the fire department and if he can't testify as to the operation of the apparatus under which he has charge I don't know who can.

Mr. McMahon: Do I understand that the question goes only to the matter of operation of the apparatus or do I understand that the question of function there applies to the question of design or the question of adaptability.

Mr. Swindler: The question speaks for itself.

The Court: I don't know what counsel understands by [fol. 356] the questions—if he will explain it to the Court. (Question read by reporter.)

Mr. McMahon: Note an exception.

A. They function very good on both touring cars and the apparatus."

X

The Court erred in overruling defendant's motion to strike the answer of the witness to the following question (B/E 17). and in permitting the witness, Henry H. Heitmann, to answer:

"Q. Did they function equally as well?

A. Equally as well.

Mr. McMahon: The government objects to the answer because it has not had an opportunity to interpose an objection. I move to strike the answer of the witness for the reason that the witness has not shown himself qualified to answer, it calls for the conclusion of the witness, assumes facts to be true not shown by the evidence and usurps the power of the jury.

The Court: Motion denied.

Mr. McMahon: Note an exception to the ruling of the Court."

XI

The Court erred in overruling defendant's objection to the following question (B/E 18) and in permitting the witness, Henry A. Steeves, to answer:

[fol. 357] "Q. Mr. Steeves, can you state whether or not Weed Chains are generally and commonly used on tractors in the vicinity of Somersville, Mass.?

Mr. McMahon: The Government interposes an objection to that question because it calls for the conclusion of the witness, the witness is not qualified to answer, it assumes facts to be true which have not been shown by the evidence, it is immaterial to the issues in this case, it is incompetent, not the best evidence and usurps the power of the jury.

Mr. Swindler: Your Honor, we have a witness here that is in the business of selling these. It must be part of his business to ascertain the demands of his trade—his cus-

tomers. He testified he has sold these chains. He must be qualified, I think, to testify to the general common use of these chains for tractors.

The Court: I think he may answer. Objection overruled.

Mr. McMahon: Note an exception.

A. Yes."

XII

The Court erred in sustaining plaintiff's objection and motion to strike the following question (B/E 18) and in striking the answer of the witness, Henry A. Steeves:

"Q. Do your duties take you about the country in your official capacity in connection with your occupation with this auto concern?

A. No, sir.

[fol. 358] Mr. Swindler: I object to that as improper cross examination.

The Court: Do you press your objection?

Mr. Swindler: I do.

The Court: It has been answered. Do you move to strike it out?

Mr. Swindler: I move to strike the answer of the witness as an answer to improper cross examination.

The Court: Motion granted.

Mr. McMahon: Note an exception."

XIII

The Court erred in overruling defendant's objection to the following question (B/E) and in permitting the witness, Maurice Welter, to answer:

"Q. Did the chains on the Snow Fighter that you operated perform the identical function as the chains on your automobile?

Mr. McMahon: The defendant objects to the question because it calls for the conclusion of the witness, the witness is not qualified to answer. It assumes facts to be true which have not been shown by the evidence, it is immaterial to the issues in this case, it is incompetent and not the best evidence and usurps the power of the jury.

The Court: Admitted.

Mr. McMahon: Note our exception.

A. They did. These chains that we bought fitted the tire and were satisfactory."

[fol. 359]

XIV

The Court erred in overruling defendant's objection to the following question (B/E 56) and in permitting the witness, Arthur C. Storz, to answer:

"Q. Were the Weed Chains manufactured and sold by the American Chain Company, on which the taxes in these suits were paid, interchangeable for use on automobiles, trucks, tractors, fire apparatus and road equipment?

Mr. McMahon: The Government interposes an objection to that question for the reason that it calls for a conclusion of the witness; the witness has not shown himself qualified to answer; it usurps the power of the jury; it usurps the power of the Court, and no proper foundation has been laid. We press the objection as stated.

The Court: Overruled.

Mr. McMahon: Note an exception.

The Court: Exception.

A. Yes, sir."

XV

The Court erred in overruling defendant's objection to the following question (B/E 68) and in permitting the witness, William D. Kirkpatrick, to answer:

"Q. You may state whether or not a chain of appropriate [fol. 360] size that will fit on an automobile or a truck could be used on a fire apparatus or road equipment equally as well.

Mr. McMahon: The defendant objects to the question because it calls for the conclusion of the witness, the witness is not qualified to answer, it assumes facts to be true which have not been shown by the evidence, it is immaterial to the issues in this case, it is incompetent and not the best evidence and usurps the power of the jury.

The Court: Overruled.

Mr. McMahon: Note an exception.

The Court: Exception.

A. Yes, sir."

XVI

The Court erred in overruling defendant's objection to the following question (B/E 69) and in permitting the witness, William D. Kirkpatrick, to answer:

"Q. Did the American Chain Company design and did you sell in your district during the taxable period Weed Chains for automobiles that differed in any respect from similar chains designated and used for tractors, road machines and fire apparatus?

Mr. McMahon: The defendant objects to the question because the question calls for the conclusion of the witness, the witness is not qualified to answer, it assumes facts to be true which have not been shown by the evidence, it is immaterial to the issues in this case, it is incompetent and not the best evidence and usurps the power of the jury.

[fol. 361]

The Court: Overruled.

Mr. McMahon: An exception.

The Court: Exception.

A. No, sir."

XVII

The Court erred in overruling defendant's objection to the following question (B/E 72) and in permitting the witness, William D. Kirkpatrick, to answer:

"Q. Did the American Chain Company design and manufacture during the taxable period and did you sell in your district during that period Weed chains that were especially designed for use on trucks?

Mr. McMahon: The defendant objects to the question because the question calls for the conclusion of the witness, the witness is not qualified to answer, it assumes facts to be true which have not been shown by the evidence, it is immaterial to the issues in this case, it is incompetent and not the best evidence and usurps the power of the jury.

Mr. Long: That is a different question, your Honor, from what we asked before in which objection was made. It omits the primary adapter and is confined to the taxable period.

The Court: It may be answered.

Mr. McMahon: Note an exception.

A. No, sir."

[fol. 362] XVIII

The Court erred in overruling defendant's objection to and motion to strike the answer of the witness to the following question (B/E 75) and in permitting the witness, William E. Wissler, to answer:

"Q. Was there any peculiar characteristics about a Weed chain during that taxable period that prevented it from being sold for general use as a commercial commodity, and which made it primarily adapted only for use as a component part of a privately owned automobile or truck?

Mr. McMahon: The government interposes an objection for the reason that no proper foundation has been laid, the witness has not shown himself qualified to answer, it calls for the conclusion of the witness, and assumes facts to be true not shown by the evidence and usurps the power of the jury and the Court. We press the objection as stated.

The Court: Overruled. Admitted.

Mr. McMahon: Note an exception.

The Witness: Will you read the question please?

(Question read.)

A. No, there was not.

Mr. McMahon: The Government moves to strike out the answer of the witness on the ground that it is usurping the power of the jury and that it states a conclusion and usurps the power of the Court.

The Court: Motion denied.

Mr. McMahon: Note an exception."

[fol. 363] XIX

The Court erred in overruling defendant's objection to the following question (B/E 91) and in permitting the witness, George B. Kutz, to answer:

"Q. Was there any peculiar characteristics about a Weed chain sold by you during the taxable period that prevented it from being sold for general use as a 'Commercial Commodity'?

Mr. McMahon: The Government interposes an objection to that question for the reason that the witness has not shown himself qualified to answer, it calls for the conclusion

of the witness and assumes facts to be true which have not been shown by the evidence. We press the objection as stated.

The Court: Overruled.

Mr. McMahon: Exception.

The Witness: May I have that question please?

(Question read.)

A. No, sir."

XX

The Court erred in overruling defendant's objection to the following question (B/E 91) and in permitting the witness, George B. Kutz, to answer:

"Q. Was there any peculiar characteristics about a Weed chain sold by you during the taxable period which made it [fol. 364] primarily adapted only for use as a component part of a privately owned automobile or truck?

Mr. McMahon: The government interposes an objection to the question for the reason that the witness has not shown himself qualified to answer, it calls for the conclusion of the witness, and the evidence shows chains were primarily designed and adapted for use on automobiles and trucks prior to the advent of tractors. The Government presses the objection.

The Court: Overruled.

Mr. McMahon: Note an exception.

(Question read.)

A. No."

XXI

The Court erred in overruling defendant's objection to the following question (B/K 108) and in permitting the witness, Harry O. Mainzinger, to answer:

"Q. Have Weed chains for use on trucks any peculiar characteristics with respect to general design, which are not identical with Weed chains for use on tractors?

Mr. McMahon: The Government objects to that question for the reason no proper foundation has been laid, the witness has not shown himself qualified to answer, it calls for the conclusion of the witness. It assumes facts to be true

which have not been shown by the evidence. We press the objection.

[fol. 365] The Court: Overruled.

Mr. McMahon: Note an exception.

"A. No."

XXII

The Court erred in overruling defendant's objection to the following question (B/E 108) and in permitting the witness, Harry O. Mainzinger, to answer:

"Q. Was there any peculiar characteristic about Weed chains sold during the taxable period that made them ordinarily unsuitable for sale and general use as a commercial commodity?

Mr. McMahon: The Government interposes an objection to that question for the reason no proper foundation has been laid. The witness has not shown himself qualified to answer, it calls for the conclusion of the witness and assumes facts to be true which have not been shown by the evidence. The Government presses the objection.

The Court: Overruled.

Mr. McMahon: Note an exception.

A. No."

XXIII

The Court erred in overruling defendant's objection to the following question (B/E 111) and in not permitting the witness, Harry O. Mainzinger, to answer:

[fol. 366] "Q. As a matter of fact, is not the chief use of chains on or in connection with automobiles and trucks?

Mr. Long: Plaintiff objects to that question because it calls for an irrelevant, incompetent and immaterial answer, seeking to show the chief use of these claims. We press the objection.

The Court: Sustained.

Mr. McMahon: Note an exception.

XXIV

The Court erred in overruling defendant's objection to the following question (B/E 113) and in permitting the witness, Walter M. Cusack, to answer:

"Q. Can a Weed chain of suitable size be used just as well on a tractor as on a truck, provided the tractor has rubber tires?

Mr. McMahon: The Government interposes an objection for the reason that it calls for the conclusion of the witness, the witness is not shown to be qualified to answer, and it assumes facts to be true not shown by the evidence. The Government presses the objection as stated.

The Court: Overruled.

Mr. McMahon: Note an exception.

A. Yes."

XXV

The Court erred in overruling defendant's objection to the following question (B/E 131) and in permitting the [fol. 367] witness, William C. Ettershank, to answer:

"Q. Will you state whether or not any part of the excise tax involved in these suits was ever collected directly or indirectly from the purchasers of the chains sold during the taxable period?

Mr. McMahon: The Government interposes an objection to the question for the reason that Section 424 of the Revenue Act of 1928, vests certain specified discretionary powers in the Commissioner of Internal Revenue which this Court is without jurisdiction to determine or review. Such evidence is immaterial to the issues in this case.

The Court: How do you claim this is material under the issues.

Mr. Swindler: If your Honor please, it has been held in the Boyle Valve Company v. United States, a case in the Court of Claims, as well as the Jefferson Electric Company in that Court, and more lately, in November of 1930, I believe by the Federal District Court of Indiana, sitting at Indianapolis, that this question as to whether the tax is directly or indirectly collected from the purchaser is in issue, that it should be covered by proof before the Court in an action such as we have here for the recovery of excise taxes. Under those authorities we tender this evidence and feel that our tender should be accepted.

The Court: To what paragraph of the complaint does that apply?

[fol. 368] Mr. Day: Paragraph five, your Honor.

The Court: Have you the Section there, as to that?

Mr. McMahon: Yes, your Honor. The Willard storage Battery decision. This paragraph as to that decision covers it.

The Court: 424?

Mr. McMahon: Subdivision two of Section 424.

The Court: If I understand the contentions of opposing counsel correctly, it has been established satisfactorily that the Commissioner of Internal Revenue is vested with sole jurisdiction to pass on the issues that might be raised under subdivision two of section 424?

Mr. Swindler: I have not yet called the Court's attention to the ruling of Judge Thomas, of this jurisdiction, denying that contention for purposes, I believe, that are material at present.

Mr. McMahon: I might say your Honor, that since Judge Thomas' decision, this Willard decision has been made (above objection read).

The Court: Objection overruled.

Mr. McMahon: Note an exception. If the Court please, for the purpose of preserving the record, we would like to have the record show that this same objection should be written out by the reporter to each question asked the witness, calling for evidence as to whether or not this tax was passed on directly or indirectly, in order to avoid confusion.

[fol. 369] Mr. Cohen: I think it would be well, if the Court please, that this shows that the exception on this point is granted to each of the three cases which are being tried as this is a very important point.

Mr. McMahon: We have no objection to the record showing that.

Mr. Long: You do not have to repeat it again. The stenographer will insert it.

Mr. McMahon: That is it.

(Question read by reporter.)

A. It was not."

XXVI

The Court erred in overruling defendant's objection to the offer of Plaintiff's Exhibit 52 (B/E 141-143), as identi-

fied and prepared by plaintiff's witness, William C. Ettershank, as follows:

"Mr. Day: Now we offer this exhibit.

Mr. McMahon: The Government objects to the offer of Plaintiff's Exhibit Number 52 (for identification), as not the best evidence obtainable; that it does not reflect the sales accurately by month; constitutes reconstructed tax figures by the percentage method and shows a portion of the tax paid on a 1/21st basis. The evidence of specific sizes sold in each month is not in issue and the provisions of Section 424 of the Revenue Act of 1928 precludes recovery regardless of the non-taxable claims of the plaintiff. Under the pleadings in issue made in this case, the question of [fol. 370] recovery on specific sizes of chains sold, is not in issue and under the provisions of Section 424 of the Revenue Act of 1928, there are vested certain discretionary powers in the Commissioner of Internal Revenue which this Court is without jurisdiction to determine or review.

Mr. Day: May it appear, for the record, Mr. McMahon, that the representatives of the Government have had opportunity to examine the originals from which these exhibits have been compiled?

Mr. Max E. Hoyt, representing the Bureau of Internal Revenue: Your Honor we made a spot check of certain months and portions of periods from sales invoices which the company had and did the same with some of their control cards and I think we have thoroughly familiarized ourselves with the method or methods which they have used in reconstructing this tax and while there are of course, small discrepancies, in the figures, I am authorized to accept those figures tentatively, subject to the approval of the Commissioner of Internal Revenue.

The Court: I understand then, that the Government has had an opportunity to examine the original records of the company from which this compilation is made?

Mr. McMahon: If the Court please, that is the distinguishing feature existing between the original records and the records from which this compilation is made. That is the reason for the difficulty in answering your question. [fol. 371] If you limit the question to the qu-stion of records from which the compilation is made——

The Court: Have the gentlemen had opportunity to examine such of the records of the plaintiff as they desire in this case? Has the defendant had this opportunity?

Mr. Hoyt: We have.

The Court: I will overrule the objection except in so far as it is based on the claim that the compilation offered is in turn based on the matter of expenditures. I confess that the evidence is in such a state that I feel unable to make a final ruling on that part of it, and the Court would suggest that, if they can do so, counsel explain more fully, through the witness, the features of the compilation to which that particular objection is directed.

Mr. McMahon: Note an exception."

XXVII

The Court erred in overruling defendant's objection to the offer of Plaintiff's Exhibit 52 (B/E 145-147), as identified and prepared by plaintiff's witness, William C. Ettershank, and in admitting such exhibit in evidence, as follows:

"Mr. Day: We renew our offer now.

Mr. McMahon: The same objection.

The Court: May I confer with counsel (conference held)?

Mr. Day: That is all.

The Court: Do you renew your offer?

[fol. 372] Mr. Day: Yes.

Mr. McMahon: The defendant renews its same objection.

The Court: The question is of such importance that since we have come to the time for recess, I think I will consider it over recess.

(Court reconvened and witness examination continued B/E 146, 147.)

The Court: Any further questions?

Mr. Day: No.

The Court: I will overrule the objection.

Mr. McMahon: Note an exception.

The Court: An exception.

Plaintiff's Exhibit No. 52 (for identification) laid in evidence as a full exhibit."

XXVIII

The Court erred in overruling defendant's objection to the offer of Plaintiff's Exhibit No. 53 (B/E 151), as prepared by plaintiff's witness, William C. Ettershank, and in admitting such exhibit in evidence as follows:

"Mr. Day: Your Honor, Mr. McMahon has no objection so far as identification is concerned to Plaintiff's Exhibit 53. This is a recapitulation of these figures on each of the sizes with the interest computed from the last payment day up to October 27. That is simply for the purpose of showing the jury on each size the amount plus the interest with the date from which it was computed, and in each of these periods. Take, for instance, the first period, which [fol. 373] would be from June 30, 1922 to January 1, 1924, all payments were made monthly. That is the shipment of July would be paid on or before the last day of August. In computing the interest, we have computed all our interest from the last interest date of payment, which would be January 31, 1923, so that is all in favor of the Government, and I understand Mr. Hoyt says, so far as the last day method of computing interest is concerned, there is no question about it, therefore, I offer Plaintiff's Exhibit 53—recapitulation of figures on each size of chain sold during the taxable period with interest computed thereon.

Mr. McMahon: The Government interposes the same objection to the offer of this exhibit as it interposed to the offer of Exhibit 52.

The Court: Same ruling, admitted.

Mr. McMahon: Note an exception."

XXIX

The Court erred in overruling defendant's motions to dismiss each of the cases, Nos. 3360, 3371 and 3421 (B/E 151, 152), made at the close of plaintiff's evidence, on each of the grounds set forth in such motions, as follows:

"Mr. Day: We have nothing more to offer. We rest.

Mr. McMahon: The defendant renews its motion to dismiss, heretofore made in this case, and moves the Court [fol. 374] to dismiss each of the cases, numbers 3360, 3371 and 3421, on each of the following grounds:

1. The provisions of Section 424 of the Revenue Act of 1928 deprive the plaintiff of its privilege of refund in each of these cases, for the recovery of manufacturer's excise tax paid or collected under the provisions of Section 900(3) of the Revenue Act of 1921.

2. The provisions of Section 424 of the Revenue Act of 1928 deprive the plaintiff of its privilege of instituting and maintaining each of these actions for the recovery of manufacturer's excise tax paid or collected under the provisions of Section 900(3) of the Revenue Act of 1921 subsequent to May 29, 1928, the effective date of such act. 3. The provisions of Section 424 of the Revenue Act of 1928 vest certain specified discretionary powers in the Commissioner of Internal Revenue, which this court is without jurisdiction to determine or review. 4. The provisions of Section 424(a) (1) of the Revenue Act of 1928 limit the jurisdiction of this court to hear and determine the issues in each of these actions for the recovery of manufacturer's excise tax paid or collected under the provisions of Section 900(3) of the Revenue Act of 1921, to actions instituted prior to April 30, 1928. 5. The provisions of Section 424 of the Revenue Act of 1928 provide a remedy for the recovery of manufacturer's excise tax paid or collected under the pro-[fol. 375] visions of Section 900(3) of the Revenue Act of 1921, which is exclusive of all other remedies. 6. The provisions of Section 424 of the Revenue Act of 1928 preclude recovery in this action for the recovery of manufacturer's excise tax paid or collected under the provisions of Section 900(3) of the Revenue Act of 1921, regardless of the non-taxable claims of the plaintiff.

The Court: The motions are denied.

Mr. Cohen: In each case?

The Court: In each case.

Mr. McMahon: Note an exception in each case on each ground.

The Court: It may be so noted."

XXX

The Court erred in overruling defendant's motion in each case (B/E 152, 153) to exclude the testimony given by the various witnesses in these cases with reference to the

various sizes of chains, made at the close of plaintiff's evidence, as follows:

"Mr. Cohen: At this time the defendant, in each case, moves that all the testimony given by the various witnesses in these cases with reference to the various sizes of chains be excluded as being incompetent, irrelevant, and immaterial to the questions involved.

The Court: Motion denied.

Mr. Cohen: May we have an exception in each case?

The Court: An exception in each case."

[fol. 376]

XXXI

The Court erred in overruling defendant's written motions for judgment, filed in each case (B/E 163) on each of the grounds set forth in each of such motions, as appears from the record made herein, to all of which the defendant at the time duly excepted.

XXXII

The Court erred in failing to find each of the findings of fact requested by the defendant in each of the above entitled cases as set forth in defendant's request for findings of fact as appears from the record made herein, to all of which the defendant duly excepted.

XXXIII

The Court erred in failing to conclude as a matter of law, each of the conclusions of law requested by defendant in each of the above entitled cases as set forth in defendant's request for conclusions of law as appears from the record made herein, to all of which the defendant duly excepted.

XXXIV

The Court erred in finding or concluding, as shown by paragraph four of its opinion, that the plaintiff, "bring this action in its own right" for the reason that the provisions of Section 424 of the Revenue Act of 1928 deprive [fol. 377] plaintiff of its privilege of instituting and maintaining these actions.

XXXV

The Court erred in finding and concluding in paragraph six of its opinion and findings, "that the tax in question was not collected directly or indirectly from customers of plaintiff," "that the arrangement cost the customer nothing," and "that in so far as the tax was collected from the purchasers, it was wholly returned to them.

XXXVI

The Court erred in finding and concluding in paragraph eight of its opinion and findings, "that the chains generally were advertised by plaintiff for use on non-taxable vehicles as well as taxable ones," and that "of this number, however, 49 sizes, which will be listed in Schedule A, hereinafter referred to, fitted at least one type of non-taxable vehicles equally as well as any taxable vehicle; that they operated as effectively upon one class of vehicles as upon the other; that wholly without adaptation for the purposes they were interchangeable upon such vehicles of both classes as used tires of substantially the same size; that there was no differentiation either of construction or of design in the chains used on the tires of non-taxable vehicles from those used on tires of taxable vehicles."

[fol. 378]

XXXVII

The Court erred in finding and concluding in paragraph eleven of its opinion and findings, "On the subordinate facts, I conclude that the chains listed in Schedule 'A' were not primarily adapted for use on taxable vehicles, but were equally adapted for use on non-taxable vehicles."

XXXVIII

The Court erred in finding and concluding in paragraph twelve of its opinion and findings, "Although, as stated, the plaintiff did not, and necessarily could not, prove by direct evidence that any particular chain found its way to the wheel of a non-taxable vehicle, yet from the evidence that the sizes listed in Schedule 'A' were adapted for such use, and that it was common practice for all types of non-taxable vehicles generally to use such chains and, indeed, that the use of such chains was often required for the successful and efficient operation of such vehicles, I conclude

that the sizes listed in Schedule 'A' were actually used on non-taxable vehicles, and that such use was common, substantial and profitable—not exceptional or experimental only."

XXXIX

The Court erred in finding and concluding in paragraph fifteen of its opinion and findings, "the tax on the sales of each month was paid by the plaintiff on or before the last [fol. 379] day of the next succeeding month" and that "so much of the tax as was paid upon the sizes in Schedule 'A' was in each case paid not later than the last day of the month following the taxable period in question."

XL

The Court erred in finding and concluding in paragraph twenty of its opinion and findings, "In the case of American-LaFrance Fire Engine Co. v. Riordan, 6 Fed. (2d) 964, it was held that fire engines and fire apparatus were not subject to the sales tax. This decision has never been overruled and must be deemed to be the law," for the reason that decision covers "sales to states or political subdivisions thereof being taxable under the Constitution and classification of fire apparatus completely manufactured, chassis and all by the American-LaFrance Company" and does not involve fire-equipment mounted on ordinary truck or automobile chassis and fire apparatus in the hands of corporations or private individuals.

XLI

The Court erred in finding and concluding in paragraph twenty-four of its opinion and findings, "Thus it is clear that if the word denotes a class, it is not a generic class, but rather a miscellaneous array of articles which come within the connotation of the word not because of any similarity to each other but solely because they have in common a certain capacity for association," for the reason the word [fol. 380] "accessories" is a generic word and if accessories be deemed a class, including all articles that have some use on or in connection with the enumerated vehicles, then that class is most certainly a generic class composed of a miscellaneous array of articles which come within the con-

notation of the word and everything within the wide domain of physics come within the scope of that word, providing such articles have some relation to the enumerated vehicles and are primarily adapted (principally or chiefly used) for that use, even though there may have been other uses for such articles for which they are not so well (primarily) adapted.

XLII

The Court erred in finding and concluding in paragraph twenty-seven of its opinion and findings, "that a showing of a common use on non-taxable vehicles was an essential part of the plaintiff's case is indicated by another expression of the Court in its opinion in the Universal Battery case," for the reason that common use is immaterial to the issue, and the plaintiff must show the use to be a "primary adapted use," meaning chief or principal use, for some vehicle or vehicles other than the enumerated vehicles.

XLIII

The Court erred in finding and concluding in paragraph twenty-eight of its opinion and finding, "And all chains of sizes thus proved to have an actual and common use with [fol. 381] non-taxable vehicles were thereby shown to be commodities other than accessories for taxable vehicles," for the reason such use may be a diverted use and not a primarily (principal) adapted use.

XLIV

The Court erred in finding and concluding in paragraph twenty-nine of its opinion and findings, "Thus the contention of each party is too broad in that it is predicated upon the proposition that the tax falls upon a generic class which must include all or none of the chains sold," for the reason that the tax falls upon a generic class including all articles having some relation to the enumerated vehicles that are primarily (principally) adapted for that use, even though there may have been some other use for such articles for which they are not so well adapted.

XLV

The Court erred in finding and concluding in paragraph thirty of its opinion and findings, "Clearly, the design of

the manufacturer and seller—not that of the original inventor—is what the regulations intended," for the reason that the word design as used in the Regulations 47, Article 16, applies to the primary (principal) adapted use for which the article is intended to be placed.

[fol. 382] XLVI

The Court erred in finding and concluding in paragraph thirty-one of its opinion and findings, "Indeed, this contention on the part of the defendant, if generally applied, would lead to incongruous results. For example, if the argument is valid, a storage battery could not be taxable as an accessory because the basic patent for storage batteries preceded the automobile industry."

XLVII

The Court erred in finding and concluding in paragraph thirty-two of its opinion and findings, "Again the defendant argues that the question of adaptability is one which can be established only by proof of duty requirements. As to this claim, it need only be said that the Act, the Regulations, and all the reported cases contain no basis for the contention. And it is well established that the question of mechanical adaptability may be shown by pragmatic evidence that the mechanism in question does in fact function. Here there is an abundance of testimony that the identical chain used on an automobile functions equally well on a non-taxable vehicle."

XLVIII

The Court erred in finding and concluding in paragraph thirty-five of its opinion and findings, "It may, therefore, be doubted that the test of chief use has application to cases [fol. 383] under Section 900. But were it otherwise, the defendant's claim could not be sustained" and "And so it is that were the plaintiff by proving that numerous sizes of chains have 'several uses' (i. e., use on tractors, fire apparatus, road equipment, etc.) to which they are equally adapted (and hence 'perfectly applicable'), has fully negatived any possible basis which the defendant might have for claiming the applicability of this doctrine," for the reason all of those uses could have been and were shown to be "Diverted Uses."

XLIX

The Court erred in finding and concluding in paragraph thirty-six of its opinion and findings, "Obviously, the tax might have been more easily administered if the Act had provided that all chains should be taxable," for the reason that all chains primarily adapted for use on the enumerated vehicles are taxable, even though there may have been some other use for such chains for which they are not so well (primarily) adapted and the burden is on the plaintiff to show clearly that he comes within any existing exemption.

L

The Court erred in finding and concluding in paragraph forty-three of its opinion and findings, "But it is also found that they did not bear the economic burden of the tax because the manufacturer itself absorbed the burden by reducing the price of the commodity by the amount of [fol. 384] the tax. It also results that, although collected from the purchaser, the tax had been 'returned to him.' For the legal effect is the same whether the refund to the purchaser is made after the tax is 'collected' from him, or whether it is sooner made in the form of a price reduction before it is 'collected' at all."

LI

The Court erred in finding and concluding in paragraph forty-five of its opinion and findings, "Accordingly, I hold that the plaintiff here, who has borne the burden of the tax, is not by this section precluded from recovery."

LII

The Court erred in finding and concluding in paragraph forty-seven of its opinion and findings, "It thus results that the defendant's motion claiming both a lack of jurisdiction and a lack of evidence to sustain the plaintiff's burden of proof on the factual requirements of Section 424 must be denied on both grounds, and the issue of fact involved must be resolved in favor of the plaintiff."

LIII

The Court erred in finding and concluding in paragraph forty-eight of its opinion and findings, "In any event, it

should be noted that the burden of proof as to this issue was fully sustained by the plaintiff as to case No. 3371."

[fol. 385]

LIV

The Court erred in overruling defendant's written notice for judgment, filed in each of the above entitled causes, as appears of record herein, on each of the grounds set forth in such written motions for judgment, to all of which the defendant at the time duly excepted.

LV

The Court erred in concluding as a matter of law that the Weed chains manufactured and sold by plaintiff during the taxable periods, July 1922 to June 1924, inclusive, were not manufactured and sold as parts or accessories of an automobile truck, automobile wagon, other automobile or motorcycle, within the meaning of the provisions of Sections 900(3) of the Revenue Act of 1921 and 600(3) of the Revenue Act of 1924.

LVI

The Court erred in concluding as a matter of law that the plaintiff has sustained the burden of proof placed on it in each of these actions for the recovery of a tax paid or collected under the provisions of Sections 900(3) of the Revenue Act of 1921 and 600(3) of the Revenue Act of 1924.

LVII

The Court erred in concluding as a matter of law that the provisions of Section 424 of the Revenue Act of 1928 [fol. 386] do not preclude recovery of the manufacturer's excise tax paid or collected under the provisions of Sections 900(3) of the Revenue Act of 1921 and 600(3) of the Revenue Act of 1924 in these actions instituted subsequent to April 30, 1928.

LVIII

The Court erred in concluding in the forty-ninth paragraph of its opinion and findings, "It results that the plaintiff is entitled to judgment as follows: In case No. 3371, in the amount of $172,470.36 with interest from January 31, 1923; in case No. 3360 in the amount of $329,250.00

with interest from January 31, 1924; and in case No. 3421 in the amount of $98,416.41 with interest from July 31, 1924. Costs in each case to the plaintiff.

LIX

The Court erred in entering judgment in favor of the plaintiff and against the defendant in each of the above entitled causes.

LX

The Court erred in entering judgment in favor of the plaintiff and against the defendant in each of the above entitled causes, for the reason such judgments are not supported by evidence.

[fol. 387]

LXI

The Court erred in entering judgment in favor of the plaintiff and against the defendant in each of the above entitled causes, for the reason that paragraphs 1 to 49, inclusive, of its findings, conclusions and opinion are not supported by evidence.

Wherefore, appellant, defendant below, prays that said decree and judgments be reversed and that the United States District Court for the District of Connecticut be ordered to enter a decree reversing the decision and judgment of the lower court in each of the above entitled causes and for such other and further relief as may be deemed proper in the premises.

John Buckley, United States Attorney for the District of Connecticut. George H. Cohen, Assistant U. S. Attorney for the District of Connecticut.

[fol. 388] IN UNITED STATES DISTRICT COURT

Nos. 3360, 3371, 3421. Law

[Title omitted]

STIPULATION AS TO RECORD

In accordance with the general rules of this Court, it is hereby agreed that the record as presented to the Clerk by the printer may be certified by the Clerk as required

by law and the rules of the Appellate Court, as a true, full, and complete copy of the original pleadings, papers, and orders used on the trial of this cause, as set forth in the pr-ecipe for transcript without further comparison by the Clerk.

Long, Chamberlain & Nyce, by —— ——, of Counsel.

[fol. 389] Marsh, Stoddard & Day, by —— ——, of Counsel. John Buckley, United States Attorney, District of Connecticut, by —— ——, of Counsel.

(Verified by Charles Elliott Pickett, Clerk, 1932.)

[fol. 390] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 391] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1932

No. 179

Argued February 10, 1933. Decided March 6, 1933

ROBERT O. EATON, Collector of Internal Revenue of the United States for the District of Connecticut, Defendant-Appellant,

v.

AMERICAN CHAIN COMPANY, a Corporation, Plaintiff-Appellee

(3 Cases)

Appeal from the District Court of the United States for the District of Connecticut

Before Manton, Augustus N. Hand, and Chase, Circuit Judges

Actions at law to recover taxes paid under duress. Judgments for plaintiff; defendant appeals. Reversed.

John Buckley, U. S. Atty., and George H. Cohen, Asst. U. S. Atty., both of Hartford, Conn., and C. M. Charest,

Gen. Counsel, Bureau of Internal Revenue, and E. F. McMahon, Sp. Atty., Bureau of Internal Revenue, both of Washington, D. C., for appellant.

Chester I. Long, Peter Q. Nyce, and Charles P. Swindler, all of Washington, D. C., and David S. Day, of Bridgeport, Conn., for appellee.

OPINION

MANTON, Circuit Judge:

These three consolidated causes resulted below in judgments for refunds of manufacturer's excise taxes, amounting to $640,508.43, paid on the manufacture and sale of Weed chains, a product of the appellee. The tax was imposed under the terms of section 900 (3) of the Revenue Act of 1921 (42 Stat. 291) and section 600 (3) of the Revenue Act of 1924 (26 U. S. C. A. § 881 note) for the periods of July, 1922, to July, 1924. The taxing statute requires a monthly return. The 1921 act provides:

"That from and after January 1, 1922, there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—(1) Automobile trucks and automobile wagons; * * * (2) other automobiles and motor cycles * * * except tractors; * * * (3) tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2)." * * *

The Act of 1924 (26 U. S. C. A. § 881 note) reads:

"On and after the expiration of thirty days after the enactment of this act there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentage of the price for which so sold or leased—(1) Automobile truck chassis and automobile wagon chassis; * * * (2) other automobile chassis and bodies and motor cycles; * * * (3) tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated

in subdivision (1) or (2), 2½ per centum. This subdivision shall not apply to chassis or bodies for automobile trucks, automobile wagons, or other automobiles." * * *

Appellee manufactures Weed chains and the sales taxed were made to others than manufacturers of automobile trucks, automobiles, and motorcycles—to jobbers and distributors. The tax was imposed only where the purchaser did not indicate the purchase was being made for a non-[fol. 392] taxable use and was imposed in conformity with articles 15 and 16 of Regulation 47 promulgated by the Treasury Department. These regulations, in substance, defined accessories as articles designed to be attached to and used in connection with automotive vehicles, referred to in subdivisions (1) and (2) of each act, to add to their utility or ornamentation, and which are primarily adapted for use in connection with such vehicles whether or not essential to their operation. The Weed chains were advertised by the appellee to the public as adapted for and meeting the essential requirements of every known make of automobile and auto truck, and the Commissioner found them to be accessories. No tax was imposed by the jobber or distributor when he sold to the dealer who in turn sold to the user. The chains were patented and were designed and primarily adapted for automobile use. Later, when the automobile truck came into use, they were redesigned and adapted for use on trucks. Appellees have classified their chains as "truck chains," "Weed Regulars," and "Weed Regular Cord Chains." Some chains were usable by tractors and fire trucks; but their use was chiefly for automobiles and automobile trucks. The tax is imposed as a revenue raising measure.

It is true, if there is a doubt as to the taxpayer's liability, it should be resolved in his favor. Ameican-La France Fire Engine Co. v. Riordan, 6 F. (2d) 964, C. C. A. 2). Still, the purpose of the statutes must be given full effect, if possible, and the claim of exemption from taxation must be clear enough. Bank of Commerce v. Tenn., 161 U. S. 134, 16 S. Ct. 456, 40 L. Ed. 645 The scheme of the statute seems clear. The 1921 act and the 1924 act both show an intent by Congress to tax, first automobile trucks and automobile wagons and accessories therefor, sold on or in con-

nection therewith and with the sale thereof at a fixed rate of 3 per cent; second, other automobiles and motorcycles including the accessories sold on or in connection therewith and with the sale, except tractors, 5 per cent; and, third, it imposes the tax when the parts and accessories are sold unattached, 5 per cent. In each instance the tax is imposed upon the manufacturer or the producer of the articles enumerated. If the chains are accessories, it is clear that Congress imposed a tax upon them when sold by this manufacturer.

The patent rights secured from the United States clearly specify that the chains were adaptable for use on automobiles to prevent skidding. They were described as primarily useful for this purpose. If Congress had intended to give exemption to such an accessory to an automobile, it would have so stated as it did in the case of tractors by reference in the statute, or it would have limited the language of the statute so as to afford clearly an exemption therefor, but it used the words "parts or accessories." The use of such generic words intended, we think, that they should be given a broad signification to effectuate the purposes of the statute. Worth Bros. Co. v. Lederer, 251 U. S. 507, 40 S. Ct. 282, 64 L. Ed. 377; Forged Steel Wheel Co. v. Lewellyn, 251 U. S. 511, 40 S. Ct. 285, 64 L. Ed. 380. In Universal Battery Co. v. United States, 281 U. S. 580, 50 S. Ct. 422, 423, 74 L. Ed. 1051, speaking of the statute, the court said:

"Thus the scheme of taxation embodied in these provisions centers around the motor vehicles enumerated therein. Their sale is the principal thing that is taxed, and the sale of parts and accessories 'for' such vehicles is taxed because the parts and accessories are within the same field with the vehicles and used to the same ends."

The Supreme Court referred to Regulations 47 of the Commissioner with approval, saying:

"The regulations also have construed the term 'accessory' as meaning any article designed to be used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for such use, whether or not essential to the operation of the vehicle.

"This construction of those terms has been adhered to in the Internal Revenue Bureau for about ten years, and

it ought not to be disturbed now unless it be plainly wrong. We think it is not so, but is an admissible construction. * * * We think the view taken in the administrative regulations is reasonable and should be upheld. It is that articles primarily adapted for use in motor vehicles are to be regarded as parts or accessories of such vehicles, even though there has been some other use of the articles for which they are not so well adapted."

It cannot be seriously doubted that the Weed chains made under the circumstances described were designed and primarily adapted for use in automobile trucks, wagons, [fol. 393] other automobiles, and motorcycles. The testimony establishes that the Weed chains were designed, adapted, and advertised to meet the essential requirements of automotive power vehicles, and were necessary to the accomplishment of their functions. In a fixed way, they are a part of the machine, and consequently are accessory to the machine.

The court below considered forty-nine specific sizes of the appellee's production of the Weed chains and their parts, and held that their sales are exempt from the statute and that no tax should be paid. It was concluded below that the primary adaptation rule, referred to in Universal Battery Co. v. United States, supra, has no application to cases where the appellee, by evidence of subsequent untaxed resales, shows two uses, one of which is the admitted principal use on automobiles and the other is a possible exempted use even though it be a diverted use. We think such a conclusion ignores the chief or principal use as being determinative of the primary adaptation rule, referred to by the Supreme Court, and it also assumes evidence of untaxed resales for possible diverted uses, sufficient to override the primary adaptation rule. In the absence of evidence showing that such diverted uses required an article of the same design and primary adaptation as is required for the automobile truck and other motor vehicle uses, the appellee could not succeed. No effort has been made to show that the tensile strength, twisting strains, or weight of the chains was different from those used and usable on automobile trucks or other automobiles. On the contrary, the evidence supports the claim of the appellant that a chain designed and primarily adapted for use on an automobile truck may be applied and used on the wheels of a tractor having com-

parable sized rubber tires. Indeed, there is no evidence that the chains referred to by the court below had the same design or primary adaptation for use on tractors.

We therefore conclude that the chains for which the tax has been imposed were primarily adapted for use and chiefly or principally used for motor vehicles, enumerated in the statute, which were taxable, and are to be regarded as parts or accessories of such vehicles even though there has been some other use of the articles for which they are not so well adapted. Universal Battery Co. v. United States, supra.

Moreover, the burden of proof was upon the appellee to establish the invalidity of the tax. United States v. Mitchell, 271 U. S. 9, 12, 46 S. Ct. 418, 70 L. Ed. 799; United States v. Anderson, 269 U. S. 422, 46 S. Ct. 131, 70 L. Ed. 347; Union Co. v. United States (Ct. Cl.) 46 F. (2d) 717. It was incumbent upon the appellee to establish that the Weed chains were not designed or primarily adapted to use on automobile trucks, automobile wagons, other automobiles, and motorcycles. This burden required a showing that the specific chains sold and for which the tax was imposed were designed and primarily adapted for some other specific use than that of automobiles. It is not enough to show that, of the forty-nine specific sizes referred to below, at least one other vehicle might have used them. The appellee admits that the chains involved were chiefly used and adapted for use on the vehicles referred to as taxable in the statute and seeks its refund on the basis that such chains were applicable for performing certain duties such as furnishing traction only with respect to other vehicles. Such assumption does not mean that the chains were not designed nor primarily adapted for use on automobile trucks or other vehicles referred to in the statute as taxable. To succeed, the appellee should have shown by evidence adaptation for other uses. In the absence of evidence of such a showing, it was erroneous to hold that chains equally adapted for a variety of uses for traction purposes only and commonly put to such uses, one of which is on automobiles, cannot be classified as parts or accessories of such vehicles. This does not mean that the chains involved can be so classified only where they are adapted solely for use on motor vehicles and are exclusively so used. Magone v. Wiederer, 159 U. S. 555, 16 S. Ct. 122, 40 L. Ed. 258. But where the chains were sold, and are predominantly and

chiefly used, as parts or accessories of such automobile trucks, other automobiles, and motorcycles, the sales are taxable in the absence of evidence showing the chains involved were not designed and primarily adapted for such use. The appellee has failed to establish its nontaxable sales.

It is an insufficient answer to say that the appellee did not know and has no way of ascertaining the amount of the sales of chains for use on other than automobile trucks, other automobiles, and motorcycles. Perfection Gear Co. v. United States, 41 F. (2d) 561 (Ct. of Claims); Burnet v. Houston, 283 U. S. 223, 51 S. Ct. 413, 75 L. Ed. 991.

We need not consider whether the claim that section 424 [fol. 394] (a) of the Revenue Act of 1928 (26 U. S. C. A. § 2424) precludes a recovery because of the view we take that the appellant has failed to establish the right to recover back the taxes paid.

Judgments reversed.

[fol. 395] In United States Circuit Court of Appeals, Second Circuit

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the courtrooms, in the Post Office building, in the city of New York, on the 13th day of March, one thousand nine hundred and thirty-three.

American Chain Company, Plaintiff-Appellee,

vs.

Robert O. Eaton, as Collector, etc., Defendant-Appellant

Three Cases

Judgment—Filed March 14, 1933.

Appeal from the District Court of the United States for the District of Connecticut

This cause came on to be heard on the transcript of record from the District Court of the United States for the District of Connecticut and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and hereby are reversed, with costs.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 396] [File endorsement omitted.]

[fols. 397–410] Petition for rehearing, covering 13 pages, filed March 20, 1933, omitted from this print. It was denied, and nothing more by order of April 6, 1933.

[fol. 411] In United States Circuit Court of Appeals, Second Circuit

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court-rooms, in the Post Office building, in the city of New York, on the 6th day of April, one thousand nine hundred and thirty-three.

[Title omitted]

Order Denying Rehearing—Filed April 7, 1933

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

Wm. Parkin, Clerk.

[fol. 412] [File endorsement omitted.]

[fol. 413] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 414] Supreme Court of the United States

Order Allowing Certiorari—Filed October 9, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is

granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,799. U. S. Circuit Court of Appeals, Second Circuit. Term No. 196. American Chain Company, Inc., petitioner, vs. Robert O. Eaton, Collector of Internal Revenue, District of Connecticut. Petition for a writ of certiorari and exhibit thereto. Filed June 22, 1933. File No. 196, O. T., 1933.

FILE COPY

Office Supreme Court, U. S.
FILED
JUN 22 1933
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 196

AMERICAN CHAIN COMPANY, INC., PETITIONER,

v.

ROBERT O. EATON, COLLECTOR OF INTERNAL REVENUE, DISTRICT OF CONNECTICUT, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

CHESTER I. LONG,
DAVID S. DAY,
PETER Q. NYCE,
CHARLES P. SWINDLER,
SAMUEL W. MCINTOSH,
Counsel for Petitioner.

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Although the petitioner contends that there were no special findings and for that reason the Court of Appeals could not review the sufficiency of the facts found, yet for the information of this Court reference is made to the following in the record:

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No.

AMERICAN CHAIN COMPANY, INC., PETITIONER,

v.

ROBERT O. EATON, COLLECTOR OF INTERNAL REVENUE, DISTRICT OF CONNECTICUT, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

American Chain Company, Inc., respectfully prays that a writ of certiorari issue to review the final decree of the United States Circuit Court of Appeals for the Second Circuit entered in the above entitled cause on the 6th day of March, 1933 (rehearing denied April 6, 1933, R. 413), reversing judgments of the United States District Court for the District of Connecticut. A certified transcript of the record in the

case, including the proceedings in said Circuit Court of Appeals, is furnished herewith in accordance with Rule 28, paragraph 1, of the Rules of this Court.

Three actions were brought by the petitioner, American Chain Company, Inc., a New York corporation, against Robert O. Eaton, Collector of Internal Revenue for the District of Connecticut, to the United States District Court for the District of Connecticut for the recovery of excise taxes upon the sale of tire chains manufactured by the petitioner, assessed against the petitioner, under the provisions of Section 900 of the Revenue Act of 1921, subdivision 3, and Section 600 of the Revenue Act of 1924, subdivision 3, which taxes were paid to said Robert O. Eaton, Collector of Internal Revenue.

Section 900 of the Revenue Act of 1921, with which Section 600 of the Revenue Act of 1924 is substantially identical, reads as follows:

> "That from and after January 1, 1922, there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—
>
> "(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;
>
> "(2) Other automobiles and motor cycles (including tires, inner tubes, parts and accessories therefor, sold on or in connection therewith or

with the sale thereof), except tractors, 5 per centum;

"(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum;"

* * * * * * *

The three actions were identical as to pleadings, with the exception that each of the three actions covered a different taxable period.

The three actions were tried to the court upon stipulations of the parties waiving trial by jury.

Judgment was rendered by the United States District Court for the petitioner (the plaintiff below) in each of the three actions, and thereupon respondent (the defendant below) appealed to the United States Circuit Court of Appeals for the Second Circuit.

Upon motion of the respondent the District Court ordered that the three actions be consolidated on appeal.

The actions were tried and decided upon the specific issues raised by the allegations of the petitioner, and denied by the respondent, that the tire chains, upon which the excise taxes were assessed and paid, were equally adapted for use on various types of automotive vehicles other than the automobile trucks, automobile wagons, other automobiles and motorcycles specified in said Revenue Acts, and were commonly used on such other types of automotive vehicles, and, therefore,

were not subject to classification as accessories for automobile trucks, automobile wagons, other automobiles and motorcycles.

The specific types of automotive vehicles, with respect to which equal adaptation and common use of the chains were alleged, comprised tractors, fire engines, snow plows, road scrapers, road graders and sprinklers.

The respondent filed in the District Court motions to dismiss on the ground that Section 424 of the Revenue Act of 1928 (Appendix E) precluded a recovery by the petitioner in such actions, and upon a denial of the same by the District Court renewed this objection in motions for judgment for the respondent. The issue raised upon these motions to dismiss and motions for judgment was argued on appeal, but not decided.

A petition for rehearing was filed by the petitioner, and denied by the Circuit Court of Appeals.

The principle of law on which the case was brought and tried is that enunciated by this Court in the case of *Universal Battery Company* v. *United States,* 281 U. S. 580, 74 L. Ed. 1051.

That decision in its direct rulings and in its interpretation and application of administrative regulations establishes a clear-cut line of demarcation for distinguishing articles taxable as accessories "for" the types of automotive vehicles specified in Section 900 of the Revenue Act of 1921 and Section 600 of the Revenue Act of 1924, and articles not so taxable. If a specified article is primarily adapted for use on the type of automotive vehicles enumerated in the Act, al-

though it has other uses for which it is not so well adapted, it is an accessory within the purview of the Revenue Acts. If, on the other hand, the specified article is equally adapted for uses other than an accessory or part for the types of automotive vehicles enumerated in the Acts, and is commonly used for such other purposes, it is not subject to classification as an accessory for the types of automotive vehicles enumerated in the Acts, and, therefore, is not subject to the tax.

The chains manufactured by the petitioner were all sold to jobbers, who, in turn, resold them to retailers, so that at the instant of sale, as of which the tax is imposed, the petitioner had neither knowledge nor means of knowledge as to the ultimate use of any specific set-up of chains. It was necessary, therefore, for the court to make a classification of these chains on the basis of their general ultimate use, or, as the Court holds in *Universal Battery Company* v. *United States, supra,* according to their relation to the enumerated types of automotive vehicles subject to the tax. The one essential issue, therefore, in determining the taxability of the chains was whether, upon the evidence, the chains at the instant of sale could or could not be classified as accessories for the enumerated types of automotive vehicles specified in the Acts.

Upon the trial of the case in the District Court, the petitioner submitted to the court evidence to establish the two particular facts upon the existence of which this Court in *Universal Battery Company* v. *United States, supra,* held that an article could not be

classified for taxation purposes as an accessory for the enumerated types of automotive vehicles, namely, (1) that the chains sold by the petitioners were not primarily adapted for use on such specific types of automotive vehicles, but were equally adapted for use on various types of motor driven vehicles not enumerated in the Acts, and which had been excluded therefrom, to wit, tractors, which were made non-taxable by the specific terms of the Acts, fire engines, which had been held to be non-taxable by the decision of the Circuit Court of Appeals for the Second Circuit in *American LaFrance Fire Engine Company* v. *Riordan*, 6 Fed. (2d) 964, and snow plows, road graders, road scrapers, street sprinklers and other types of automotive vehicles not primarily intended for the transportation of persons or property upon highways, and which had been held non-taxable by departmental rulings (Regulations 47, Article 12, Appendix F), and (2) that the chains were commonly used on such non-taxable vehicles.

Through the testimony of forty-six witnesses there was established not only by personal observations and opinions of the witnesses, but by reproduction of the actual circumstances attending the sale and use of chains, the subordinate facts found by the District Court (R. 30, 31), namely, that chains of the petitioner of the sizes included in the judgment and on which the tax had been assessed "fitted at least one type of non-taxable vehicles equally as well as any taxable vehicle; that they operated as effectively upon the one class of vehicles as upon the other; that wholly without adapta-

tion for the purpose they were interchangeable upon such vehicles of both classes as used tires of substantially the same size; that there was no differentiation either of construction or of design in the chains used on the tires of non-taxable vehicles from those used on tires of taxable vehicles; and that in ordering chains, the universal practice was to order by size only, without specification of the purpose, i. e., whether for taxable or non-taxable vehicles." The evidence by which this general use was proved was derived from witnesses whose field of observation covered practically the entire United States.

The respondent did not offer any testimony directed to the disproving of the facts established by the evidence of the petitioner.

From the subordinate facts referred to above the District Court drew its conclusions of fact upon which its decision was predicated, namely, that the chains which had been subjected to the tax were not primarily adapted for use on the types of automotive vehicles enumerated in the Revenue Acts of 1921 and 1924, but were equally adapted for use on types of vehicles not included in the Acts, and were commonly so used.

The Circuit Court of Appeals reversed the decision of the District Court, first, on the theory that chief use was determinative of primary adaptability and, therefore, of tax liability; and, second, by overruling or disregarding the findings of fact and conclusions of law made by the District Court, and substituting different findings and conclusions.

The respondent requested the District Court to make special findings of fact and conclusions of law. With

this request the court did not comply, other than to enter the order (Record, p. 68) that the findings of fact and conclusions of law stated in the opinion should constitute special findings of fact and conclusions of law.

Specifications of Error.

The Court of Appeals of the Second Circuit erred:

1. In reviewing the general findings and conclusions of the District Court in the absence of special findings of fact and conclusions of law.

2. In rejecting the findings of fact and conclusions of law of the District Court made upon non-conflicting evidence and substituting therefor its own findings and conclusions.

3. In holding that principal use of the petitioner's tire chains was determinative of the question of primary adaptation.

4. In holding that there was an absence of evidence showing that the use of petitioner's tire chains for non-taxable vehicles required an article of the same design as for taxable vehicles.

5. In holding that there was no evidence that the petitioner's chains had the same design or adaptability for use on tractors as on taxable vehicles.

6. In holding that the petitioner's burden of proof required a showing that its tire chains were designed and primarily adapted for some other specific use than that of automobiles.

7. In holding that the petitioner's tire chains were primarily adapted for trucks and automobiles and as parts and accessories for such vehicles.

8. In failing to affirm the conclusion of the District Court that the petitioner's chains were as equally adapted for use on non-taxable vehicles as taxable vehicles, and were commonly used on such non-taxable vehicles.

9. In failing to affirm the conclusion of the District Court that Section 424 of the Revenue Act of 1928 did not preclude the determination by the District Court of the question whether or not the tax assessed against and collected from the petitioner was not collected directly or indirectly from the purchasers of said chains.

10. In failing to affirm the conclusion of the District Court that the tax assessed against and collected from the petitioner had not been collected directly or indirectly from the purchasers of the petitioner's chains.

11. In reversing the decision of the District Court.

Reasons Relied Upon for Allowance of Writ of Certiorari.

(1) The District Court, in this jury-waived case, did not make special findings of fact. It filed an opinion (R. 50) which contains certain general findings which that court afterwards attempted to make special by orders (R. 68, 90, 111). This it was without authority to do. The respondent filed motions in each case at the close of all the evidence (R. 345) for judgments in his favor (R. 21, 81, 102) but these motions were never

passed on by the District Court and, of course, no exceptions were taken thereon during the progress of the trial, although assignments of error were made (R. 376, 385). Motions were also made to dismiss for lack of jurisdiction under Section 424 of the Revenue Act of 1928 (R. 8, 77, 97), which were denied (R. 9), exceptions taken thereto (R. 123) and assignments of error made (R. 348), but the Court of Appeals did not pass on the assignment of error (R. 397). The Court of Appeals made certain findings of fact (R. 394-5-6) which it was without authority to do. The respondent took exceptions to certain rulings of the District Court during the progress of the trial, but while assignments of error were made on such rulings they were not relied on by respondent in the Court of Appeals and no rulings of that court were made thereon. Petitioner contends that under the condition of the record as above set out the Court of Appeals should have affirmed the case for the reason that there was no question of fact or law that it could review and that this case is ruled by *Harvey Co.* v. *Malley*, 288 U. S. —, 77 L. Ed. 621. Under the decision of this Court in *Law* v. *United States*, 266 U. S. 494, 69 L. Ed. 401, exceptions would have been unavailing, for the reason that there were no special findings of fact.

(2) The decision of said Circuit Court of Appeals, in overruling and disregarding the general findings of fact made by the District Court on adequate and non-conflicting evidence, so far departs from the accepted and usual course of judicial procedure as to call for an exercise of this Court's power of supervision.

(3) The decision of the Circuit Court of Appeals of the Second Circuit in the instant case is in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *McCaughn* v. *Electric Storage Battery Co.*, 63 Fed. (2d) 715, and *Reutzahn* v. *Willard Storage Battery Co.*, of the Sixth Circuit Court of Appeals, decided May 9, 1933, and the decisions of the Court of Claims in *Bassick Manufacturing Company* (72 Ct. Cls. 672), and *Universal Battery Company* (on retrial) decided June 5, 1933. The decision in the instant case being in conflict with the decisions of the Courts of Appeal of the Third and Sixth Circuits and the Court of Claims, this petition for certiorari is presented to review the decision of the Second Circuit Court of Appeals. No petition for certiorari has been presented to this Court by the Solicitor General to review the judgment of the Third Circuit Court of Appeals and the same has become final.

(4) The decision of the Circuit Court of Appeals conflicts with the decision of this Court in *Universal Battery Co.* v. *U. S., supra.*

(5) The decision of the Circuit Court of Appeals is erroneous in considering the design of the inventor as indicative that tire chains were for use only on automobiles, whereas the prior and basic Parson's patent shows other uses for the design, and the court should have considered the design and intention of the manufacturer and seller during the taxable period as controlling (R. 40, 131-134, 138).

(6) That tire chains were not intended to be taxed by the acts of Congress here involved is apparent by

the change in the language used in the enactment of the Revenue Act of 1932 wherein tire chains are specifically named.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding said court to certify and send to this Court, on a day to be designated, a full and complete transcript of the Record and of all proceedings of the Circuit Court of Appeals had in this cause to the end that this cause may be reviewed and determined by this Court; that the judgment or judgments of the Circuit Court of Appeals be reversed; and that the petitioner be granted such other and further relief as may seem proper.

AMERICAN CHAIN COMPANY, INC.,
By CHESTER I. LONG,
DAVID S. DAY,
PETER Q. NYCE,
CHAS. P. SWINDLER.
SAMUEL W. MCINTOSH,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No.

AMERICAN CHAIN COMPANY, INC., PETITIONER,

v.

ROBERT O. EATON, COLLECTOR OF INTERNAL REVENUE, DISTRICT OF CONNECTICUT, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

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1. The Opinions of the Courts Below.

The opinion of the Circuit Court of Appeals of the Second Circuit was rendered March 6, 1933 (63 Fed. (2d) 783; R. 391); the decision of the Court of Appeals denying motion for rehearing was dated April 6, 1933.

The opinion of the District Court of Connecticut was rendered March 5, 1932 (58 Fed. (2d) 246, 248) (two opinions, first on motion to dismiss for lack of jurisdiction under Section 424, and the other on the merits) (R. 9, 26).

2. Jurisdiction.

The date of the judgment to be reviewed is April 6, 1933, when the Petition for Rehearing was denied.

Jurisdiction of this Court is invoked under Section 240 (*a*), Judicial Code, as amended by the Act of February 13, 1925.

3. Statement of the Case.

The statement of the case has been given in the Petition and in the interest of brevity will not be repeated here.

4. The Questions Presented.

The questions involved are:

1. Whether the Circuit Court of Appeals exceeded its authority in disregarding the general findings of fact and the conclusions of law of the District Court.

2. Whether the Circuit Court of Appeals erred in adopting the rule that chief use is determinative of primary adaptation, in which respect it is in conflict with the decision of the United States Circuit Court of Appeals for the Third Circuit in the case of *McCaughn* v. *Electric Storage Battery Company, supra,* and the decision of the Sixth Circuit in *Routzahn* v. *Willard Storage Battery Company,* and the several decisions of the Court of Claims.

3. Whether the decision of the Circuit Court of Appeals is in conflict with the decision of this Court in *Universal Battery Company* v. *United States, supra.*

5. Statutes.

The pertinent statutes are Section 900 of the Revenue Act of 1921 (quoted in the Statement in the Petition); Section 600 of the Revenue Act of 1924, which is similar, and Section 424 of the Revenue Act of 1928. (Appendix E.)

6. ARGUMENT.

The Circuit Court of Appeals erred and exceeded its authority in overruling the findings and conclusions of the District Court.

There were no special findings of fact and conclusions of law to be reviewed by the Circuit Court of Appeals unless the order of Judge Hincks (Record, p. 68) can be legally given the effect of making the general statement of facts and conclusions of law special findings of fact and conclusions of law. If this order can be given such effect, the Circuit Court of Appeals could have reviewed the findings and conclusions of the District Court only to the extent necessary to determine whether or not they support the judgment of the District Court—otherwise the Circuit Court of Appeals would have no such authority.

Either with or without special findings of fact, the authority of the Circuit Court of Appeals to review the evidence would have been limited to a finding whether or not there was substantial evidence offered to support the judgment.

It clearly appears, however, from the opinion of the Circuit Court of Appeals that its conclusions in revers-

ing the decision of the District Court were predicated upon a rejection of findings by the District Court drawn from evidence supporting the same and of conclusions of fact drawn by the District Court from such findings of fact, and the substitution therefor of different findings and conclusions. This course of procedure deprived the petitioner of its right to have the determination of the facts made by the trial court which heard the evidence.

The general findings in the opinion of the District Court cannot be construed to be special findings upon the order entered by Judge Hincks (R. 68), and under Section 700, R. S., in the absence of special findings the general findings of the District Court are conclusive upon all matters of fact and prevent any inquiry into the conclusions of law embodied therein, except the rulings during the progress of the trial.

Some rulings during the progress of the trial were excepted to and included in the bill of exceptions but were not pressed in the brief or oral argument of the respondent in the Court of Appeals.

In *Fleischmann C. Co.* v. *Forsberg,* 270 U. S. 355, 70 L. Ed. 629, it is said:

> "The opinion of the trial judge, dealing generally with the issues of law and fact and giving his reasons for his conclusions, is not a special finding of facts within the meaning of the statute." (Citing cases.)

The order made by the District Court on April 29, 1932 (R. 90), was ineffective to create special findings.

In *Java Cocoanut Oil Co.* v. *Pajaro Valley Nat. Bank*, 300 Fed. 305 (9th C. C. A.), the court used the following language:

> "At the close of the trial the court filed a written opinion directing a judgment in favor of the plaintiff for a stated amount and closing with the statement 'The foregoing are the findings and conclusions herein'. Judgment was entered accordingly and both parties have brought the case to this court by writ of error treating the opinion of the trial court as a special finding within the proviso of Section 700 (R. S.). The assumption of the parties that the opinion of the court constitutes a special finding is without foundation, and there is therefore no question before us for review." (Citing cases.) "We have not lost sight of the fact that the opinion is here declared to be the findings of the court, *but such a declaration cannot make of the opinion something which it manifestly is not.* * * * Furthermore, if the opinion is to be deemed a finding at all it is a general and not a special one, because it disposes of all the issues in the case and directs a judgment in favor of the plaintiff and in such cases the finding must be either general or special. It cannot be both." (Italics supplied.)

One of the leading cases on this point is that of *Rasmusson* v. *Eddy's Steam Bakery, Inc.* (9th C. C. A.), 57 Fed. (2d) 27. The procedure in that case was very similar to the instant case. The case was tried without a jury and the contention made was that the evidence did not sustain the judgment. That is the contention in this case. A motion was made by the appel-

lant at the conclusion of the testimony for a judgment upon the evidence, which was denied. A similar motion was made in this case. The transcript there contains the "decision" of the trial court dated February 5, 1931, which is reported in 47 Fed. (2d) 247. The trial court made an order in that case, as the District Court did in this, attempting to make its opinion contain special findings of fact. On the 11th of February, 1931, at the request of parties by their counsel in open court the trial court made a special finding, namely, that the defendant collector in demanding and collecting the tax in question acted under the direction of the Commissioner of Internal Revenue. Upon the argument of the case in the Court of Appeals it was suggested that the "decision" of the trial court could be treated as a special finding. After the argument in the Court of Appeals the trial court signed an order *nunc pro tunc* adopting the decision as special findings of fact. The Court of Appeals said:

> "Waiving the jurisdictional question involved, the fact remains that the decision or opinion of the court cannot be treated as special findings in a case at law tried by the court without a jury." (Citing cases.)

Petition for certiorari was filed in the Eddy's Steam Bakery case and opposed by the Solicitor General, who cited the Fleischmann case, using this language:

> "After the appeal was taken the District Court made an order attempting to adopt the opinion as its special findings of fact and conclusions of law. Such an order was obviously

> ineffective. After evidence had been offered respondent moved for judgment in his favor. This was denied, and an exception taken."

Certiorari was denied by this Court on October 10, 1932.

In *British Queen Mining Company* v. *Baker S. M. Co.*, 139 U. S. 222, 35 L. Ed. 147, Chief Justice Fuller, in the consideration of a case tried without a jury under sections 649 and 700 of the Revised Statutes, stated that the finding must be "either general or special"; that it could not be both general and special. In that case it was a general finding. This Court further said:

> "The record contains a bill of exceptions, but no exceptions to the rulings of the court in the progress of the trial of the cause were thereby duly presented, and although after reciting the evidence it is therein stated that 'the court thereafter and during the said term made the following findings of fact and judgment thereon' which is followed by an opinion of the court assigning reasons for its conclusions, this cannot be treated as a special finding enabling us to determine whether the facts found support the judgment, nor can the general finding be disregarded." (Citing cases.)

The only difference between that and the instant case is that in this the District Court made a formal order (R. 90) and there the trial court said the same thing in the bill of exceptions. Both courts endeavored to make special findings in an opinion which this Court has said many times cannot be done.

The Fleischmann case was recently cited and approved in *Harvey Company* v. *Malley, supra,* and this Court repeated the language of Mr. Justice Sanford as follows:

> "The opinion of the trial judge, dealing generally with the issues of law and fact and giving the reasons for his conclusion, is not a special finding of facts within the meaning of the statute. * * * And it is settled by repeated decisions, that in the absence of special findings, the general finding of the court is conclusive upon all matters of fact, and prevents any inquiry into the conclusions of law embodied therein, except in so far as the rulings during the progress of the trial were excepted to and duly preserved by bill of exceptions, as required by the statute."

In the Harvey case, *supra,* this Court quoted in full Sections 649 and 700 of the Revised Statutes (see Appendix A), which govern the extent to which the findings and rulings of the lower court may be reviewed. Respondent took exceptions to certain rulings of the District Court during the progress of the trial, but while assignments of error were made on such rulings they were not relied upon in the Court of Appeals and no rulings were made thereon by that Court (R. 391).

The motions made by Respondent for judgments were not acted upon by the District Court and of course there were no exceptions taken thereto. If there had been, in the absence of special findings, they could not be considered because of the ruling in *Law* v. *U. S., supra,* wherein Justice Brandeis said:

"At the close of plaintiff's evidence the defendant moved for judgment. The motion was denied. No special findings of fact were made. Judgment for $3,335 was entered for the plaintiff upon a general finding, 290 Fed. 972. Upon writ of error sued out by the government the circuit court of appeals reversed the judgment and directed the district court to enter judgment for the defendant. 299 Fed. 61. * * * The government's motion for judgment was made on the ground, among others, that plaintiff had failed to prove that he ever had been, or then was, totally disabled, within the meaning of the contract of insurance.

"The court of appeals held that the motion should have been granted. Its judgment must be reversed and that of the district court must stand, because the case was tried without a jury, and there was only the general finding for the plaintiff. Neither the evidence nor the questions of law presented by it were reviewable by the court of appeals. To inquire into the facts and the conclusions of law on which the judgment of the lower court rests was not permissible." (Citing cases.)

This case is authority on the point that the motions for judgment in these cases at the close of the trial did not change the situation and permit the Court of Appeals to review the evidence, as it did, and come to a different conclusion from that of the district court.

Discussion of Essential Findings of Fact by the Trial Court Which Were Rejected or Modified by the Circuit Court of Appeals.

The Circuit Court of Appeals in its opinion refers to the use of petitioner's chains on non-taxable vehi-

cles as a "diverted use" and one "to which they are not so well adapted".

These rulings were made despite the findings of equal adaptability by the District Court and the evidence of numerous witnesses that identically the same chains were sold and advertised to the trade for use on taxable and non-taxable vehicles, that the chains purchased by owners of non-taxable vehicles were the same chains as those purchased by the owners of taxable vehicles and were purchased by name and without designation of use, that the chains fulfilled the same functions on non-taxable as on taxable vehicles, and that appropriate sizes of chains could be used interchangeably on taxable and non-taxable vehicles, and in their practical use were so interchanged—none of which evidence was controverted by the respondent. (See summary of evidence Appendices C and D.)

The Circuit Court of Appeals made two rulings which not only disregarded and overruled general findings of fact by the District Court, but incorrectly asserted the absence of evidence in support of the findings of the District Court.

The opinion of the Circuit Court of Appeals states (R. 395):

> "In the absence of evidence showing that such diverted uses required an article of the same design and primary adaptation as is required for the automobile truck and other motor vehicle uses, the appellee could not succeed."

The court further stated (R. 396):

> "The appellee admits that the chains involved were chiefly used and adapted for use

> on the vehicles referred to as taxable in the statute and seeks its refund on the basis that such chains were applicable for performing certain duties such as furnishing traction only with respect to other vehicles. Such assumption does not mean that the chains were not designed nor primarily adapted for use on automobile trucks or other vehicles referred to in the statute as taxable. To succeed, the appellee should have shown by evidence adaptation for other uses. In the absence of evidence of such a showing, it was erroneous to hold that chains equally adapted for a variety of uses for traction purposes only and commonly put to such uses, one of which is on automobiles, cannot be classified as parts or accessories of such vehicles."

The opinion further states (R. 395):

> "Indeed, there is no evidence that the chains referred to by the Court below had the same design or primary adaptation for use on tractors."

The incorrectness of these three statements by the court is proved by reference to the evidence, of the following witnesses which comprise only a small part of the evidence directed to the proof of the facts referred to by the Court—reference being made to the summary in Appendix D for additional evidence:

William A. Palmer (R. 163); Walter J. Kretlow (R. 247); George B. Kutz (R. 252, 253); William E. Wissler (R. 231).

The opinion of the Circuit Court of Appeals states (R. 396):

> "It was incumbent upon the appellee to establish that the Weed chains were not designed or primarily adapted to use on automobile trucks, automobile wagons, other automobiles and motorcycles. This burden required a showing that the specific chains sold and for which the tax was imposed were designed and primarily adapted for some other specific use than that of automobiles."

This ruling evidences a misunderstanding of the finding of the District Court. The District Court did not hold that proof of adaptation of any specific size of chains for use on a non-taxable automotive vehicle was sufficient to exempt that size of chain from the tax.

The District Court first found that Weed tire chains as a generic class were equally adapted for use on non-taxable vehicles as well as taxable vehicles, and that they were commonly used on non-taxable vehicles. The District Court then held that any specific size of chain was exempt from taxation only when the proof supported the fact that there was a non-taxable vehicle requiring that specific size of chain. This fact having been established the District Court ruled that the common use of the specific sizes of chains on non-taxable vehicles might be proved by circumstantial evidence.

The ruling of the District Court on this point is as follows (R. 39):

> "To prove a use for a chain of any given size on non-taxable vehicles, it was indispensable for the plaintiff to show that a non-

> taxable vehicle existed calling for that specific size of chain. The existence of the use thus established, that it was a common use might be proved by circumstantial evidence. And all chains of sizes thus proved to have an actual and common use with non-taxable vehicles were thereby shown to be commodities other than accessories for taxable vehicles."

The Circuit Court of Appeals in its opinion states (R. 395):

> "No effort has been made to show that the tensile strength, twisting strains or weight of the chains was different from those used and usable on automobile trucks or other automobiles."

This indicated requirement is exactly contrary to the ruling of the Supreme Court in *Universal Battery Company* v. *United States, supra*, that to take a specific article out of the taxable classification, there must be an equality of adaptation for uses other than in connection with taxable vehicles. If the chains for use on non-taxable vehicles required a different tensile strength or weight than chains for use on taxable vehicles, Petitioner would have had no right of recovery, for that fact would have furnished a means for classification of its chains as between chains adapted for the taxable types of motor vehicles and those adapted for the non-taxable types of motor vehicles. In this reference the Circuit Court of Appeals apparently misunderstood a conclusion reached by the District Court.

On the trial of the case in the District Court, the Respondent advanced the claim that proof of equal adaptability of chains for non-taxable vehicles could only be established through proof of identical duty requirements, such as tensile strength, twisting strains and weight. This claim on the part of the Respondent went, of course, only to the weight and sufficiency of the Petitioner's evidence, and that the claim was given full consideration by the Court is indicated by its discussion of this claim in its opinion (R. 40):

> "Again, the defendant argues that the question of adaptability is one which can be established only by proof of duty requirements. As to this claim, it need only be said that the Act, the Regulations, and all the reported cases contain no basis for the contention. And it is well established that the question of mechanical adaptability may be shown by pragmatic evidence that the mechanism in question does in fact function. Here, there is an abundance of testimony that the identical chain used on an automobile functions equally well on a non-taxable vehicle. That the testimony is the product of actual experience as distinguished from mathematical computation does not vitiate its admissibility and, if anything, adds to its weight."

It is respectfully submitted that the above overruling by the Circuit Court of Appeals of general findings of fact made by the District Court on adequate and uncontroverted evidence, and the adoption of assumptions of fact, neither deducible from the findings of the District Court nor from the evidence, is not

only erroneous, but also represents an exercise of judicial authority not vested in the Court on an appeal in an action at law.

The extent to which the above rulings on the facts by the Circuit Court of Appeals controlled its ultimate decision is evidenced by the conclusions drawn from the opinion in the instant case by the Circuit Court of Appeals for the Sixth Circuit in *Routzahn* v. *Willard Storage Battery Company,* decided May 9, 1933 (not reported). In that case the court affirmed a judgment of the District Court for the Northern District of Ohio in favor of the taxpayer based on a finding of facts essentially similar to that of the District Court in the present case. In its opinion that Court used—as distinguishing the instant case from the one there under consideration—the specific ruling of fact by the Circuit Court of Appeals for the Second Circuit discussed above—that there was no proof in the instant case that the chains were designed or adapted for any other specific use than for automobiles.

CHIEF USE.

The Circuit Court of Appeals erred in holding that chief use of the petitioner's tire chains was determinative of primary adaptation.

In the opinion of the Circuit Court of Appeals in this case, there are the following statements:

> "It was concluded below that the primary adaptation rule, referred to in *Universal Battery Co.* v. *United States* (*supra*), has no application to cases where the appellee, by evidence

of subsequent untaxed resales, shows two uses, one of which is the admitted principal use on automobiles and the other is a possible exempted use even though it be a diverted use. We think such a conclusion ignores the chief or principal use as being determinative of the primary adaptation rule, referred to by the Supreme Court, and it also assumes evidence of untaxed resales for possible diverted uses, sufficient to override the primary adaptation rule" (Record, p. 395).

"We therefore conclude that the chains for which the tax has been imposed were primarily adapted for use and chiefly or principally used for motor vehicles, enumerated in the statute, which were taxable, and are to be regarded as parts or accessories of such vehicles even though there has been some other use of the articles for which they are not so well adapted. *Universal Battery Co.* v. *United States, supra*" (Record, p. 395).

"But where the chains were sold, and are predominantly and chiefly used, as parts or accessories of such automobile trucks, other automobiles and motorcycles, the sales are taxable in the absence of evidence showing the chains involved were not designed and primarily adapted for such use. The appellee has failed to establish its non-taxable sales" (R. 396).

In the case of *McCaughn* v. *Electric Storage Battery Company*, the opinion states:

"The fact that automobiles are the largest users of storage batteries, is not decisive of the case. That they are the largest users is a fact, but taxability of a battery under this statute depends, not upon the quantity used, but upon

whether or not it is primarily adapted for use in an automobile and not equally adapted to any other use requiring the same load. Unless it fulfills these two requirements, it is not a 'part or accessory' within the meaning of this statute. Judge Kirkpatrick, who saw the witnesses and heard all the testimony, has expressly found it is not and the testimony, fairly interpreted, as a whole and not fragmentarily, abundantly supports his findings. These findings being supported by the evidence are, under the facts of this case, conclusive upon us."

It is apparent that there is a direct conflict in these two decisions as to the effect to be accorded chief use in determining liability or non-liability for the tax. Obviously the Circuit Court of Appeals for the Second Circuit is in error in applying the doctrine of chief use in determining primary adaptation. An article may have an equal adaptation for a purpose in which its quantity use is restricted. Chief use can properly be given consideration by a Court in reaching a conclusion of fact as to primary adaptation as against equal adaptation. Likewise, chief use can properly be given consideration by a Court in reaching a conclusion of fact as to the existence of common use, but certainly chief use for one purpose could never unqualifiedly negative common use for another purpose. Obviously any article may have a preponderance of use for one purpose, but a common use for other purposes. It would be contrary to the rule of strict construction of tax statutes in favor of the taxpayer to classify any article as an accessory for the types of

automotive vehicles enumerated in the act, when such articles have a common use throughout the country for non-taxable vehicles.

Neither in the findings of the District Court nor in the evidence was there any substantial basis for this finding of chief use by the Circuit Court of Appeals.

There was no evidence before the District Court as to the comparative number of chains used on taxable and non-taxable vehicles from which such a conclusion could be drawn. The District Court found (R. 30):

> "From the evidence I find that the chains in question were all sold by the plaintiff to jobbers and dealers, so that even the plaintiff did not know, and could not know, how many of the chains thus sold were eventually used or purchased for use on non-taxable vehicles."

It was conceded that the number of taxable motor vehicles exceeded the number of non-taxable motor vehicles, and the District Court in reaching its conclusions gave consideration to that fact, as indicated by the following statement from its opinion (R. 31):

> "It may also be noted that the number of taxable vehicles during the taxable periods exceeded the number of non-taxable motor vehicles. If that fact was not fully established by competent evidence, at least it was conceded by the plaintiff on brief."

Even if the doctrine of chief use could properly be given the legal force and effect ascribed to it by the

Circuit Court of Appeals, a conclusion as to the existence of chief use as a fact must necessarily be predicated on something more specific than a mere indefinite preponderance in the number of taxable vehicles over non-taxable vehicles.

The reference of the Circuit Court of Appeals to the case of *Perfection Gear Company* v. *United States*, 41 Fed. (2d) 561, is not in point. In that case the Court found the articles in question (timing gears) were specially designed and primarily adapted for automobiles and trucks, thus giving them a classification as accessories therefor—the court holding that in such circumstances a taxpayer was liable for the tax on all of the timing gears, except those which the taxpayer could definitely prove were employed in a non-taxable use. This ruling accords with Regulations 47, Revised Article 16. In the present case the District Court found as facts the equal adaptation of chains for non-taxable vehicles and common use for such purpose, which under both court and departmental rulings precludes the classification of chains as accessories for the automotive vehicles enumerated in the Revenue Acts.

Decision of the Circuit Court of Appeals is in conflict with the decision of this Court in Universal Battery Company v. United States, supra.

There have already been considered in the preceding argument various conclusions of the Circuit Court of Appeals which are at variance with the rulings of this Court in the case of *Universal Battery Company* v. *United States, supra.*

There are two further rulings of the Circuit Court of Appeals which are directly at variance with the ruling of this Court. The opinion of the Circuit Court of Appeals states (Record, p. 396):

> "It was incumbent upon the appellee to establish that the Weed chains were not designed or primarily adapted to use on automobile trucks, automobile wagons, other automobiles and motorcycles. This burden required a showing that the specific chains sold and for which the tax was imposed were designed and primarily adapted for some other specific use than that of automobiles."

The Circuit Court of Appeals is correct in its conclusion that the burden rested upon the petitioner to prove that the chains were not primarily adapted for use on the types of motor vehicles enumerated in the Revenue Acts. To meet this burden, however, did not require proof by the petitioner that the chains were primarily adapted for use on non-taxable types of motor vehicles. This Court applied the rule of equal adaptability, which is the antithesis of primary adaptability. There can be no primary adaptability for any one purpose where there is equal adaptability for two or more purposes. Therefore, the petitioner in establishing the fact, as found by the District Court, that the chains were as equally adapted for use on non-taxable as on taxable vehicles, met in this respect its full burden of proof.

The opinion of the Circuit Court of Appeals states (Record, p. 393):

"The patent rights secured from the United States clearly specify that the chains were adaptable for use on automobiles to prevent skidding. They were described as primarily useful for this purpose. If Congress had intended to give exemption to such an accessory to an automobile, it would have so stated as it did in the case of tractors by reference in the statute, or it would have limited the language of the statute so as to afford clearly an exemption therefor, but it used the words 'parts or accessories'. The use of such generic words intended, we think, that they should be given a broad significance to effectuate the purposes of the statute."

This conclusion is at variance with the ruling of this Court in the case of *Universal Battery Company* v. *United States, supra,* in two respects:

First. The word "primarily" used in conjunction with "adapted" has two distinctive meanings: One—first in order of time; two—first in rank, which would denote a fitness for a specific use superior to that of its fitness for any other use. Obviously the second meaning is the one with which it is employed by this Court and in the Regulations, because the term "primarily adapted" is used as the antithesis of "equally adapted". This is further evidenced by the fact that Regulations 47, Article 16, uses the word "peculiarly" as the equivalent of "primarily" in the definition of articles excluded from classification as accessories.

"Articles which have a general commercial use and which are not especially designed and

peculiarly adapted for use in connection with automobile trucks, automobile wagons, other automobiles or motorcycles are not subject to tax as 'parts' or 'accessories'."

Also, it is apparent from the standpoint of commercial use that first adaptation in point of time, or even primary adaptation at a time antedating that under consideration, is without relevancy. Electric current was first commercially employed in the telegraph, but today there are hundreds of uses for which it is equally well adapted, although the extent of use differs according to the requirements of each particular use. Pneumatic tires were first employed on horse-drawn vehicles and bicycles, but at the present time they are equally adapted for use in connection with motor driven vehicles. Therefore, the Court, in reaching the above stated conclusion, has fallen into the error either of according to "primarily" its meaning of first in order of time, or of drawing its conclusion from a commercial status existing at the date of the granting of the patent, entirely different from the commercial status existing during the taxable period.

Second. The conclusion that if Congress had intended to except chains, it would have specified them as it did in the case of tractors, is inconsistent with the ruling of this Court in the case of *Universal Battery Company* v. *United States, supra,* and a number of decisions in the lower courts and departmental rulings, which have held to be non-taxable various articles which in their use have a relationship to the motor vehicles specified in the Revenue Acts similar to chains.

This conclusion of the Circuit Court of Appeals also ignores its own decision in the case of *American La France Fire Engine Company* v. *Riordan, supra,* in holding fire engines to be non-taxable, although not specifically exempted in the Act, as were tractors.

The only consistent conclusion from the wording of the Act is that if a legislative intent to tax chains had existed, chains would have been specifically named, as were tires.

The case of *Bassick Manufacturing Company* (No. 350, consolidated in this Court in the *Universal Battery Company case, supra*) was again tried in the Court of Claims (72 Ct. Cls. 672) and decided on October 20, 1931. The Court of Claims, following the Universal Battery Company opinion, set aside its former judgment and gave judgment for the plaintiff.

After the decision of this Court in *Universal Battery Company, supra,* No. 127 was again tried by the Court of Claims. That Court, in an opinion dated June 5, 1933, gave judgment for the plaintiff.

The court found that

> "the Plaintiff's batteries were not specially designed for use upon automobiles but were equally adapted to a variety of uses other than upon automobiles and automobile trucks and were commonly sold for and commonly put to such uses. None of the batteries sold by the plaintiff upon which the tax was paid were manufactured with any characteristic which made them adaptable for use in automobiles and automobile trucks only or prevented the use of these batteries for non-automobile purposes. None

of them were so designed or constructed as to make them primarily adapted for use on automobiles, automobile trucks, automobile wagons, or motorcycles."

Similar findings were made in the instant case by the District Court and should have been followed by the Circuit Court of Appeals.

CONCLUSION.

The District Courts of Connecticut, the Eastern District of Pennsylvania, the Northern District of Ohio, and the Court of Claims have followed the rule enunciated by this Court in *Universal Battery Company* v. *United States, supra.* The District Courts of Pennsylvania and Ohio have been affirmed by the Courts of Appeal in the Third and Sixth Circuits. The decision of the Circuit Court of Appeals for the Second Circuit represents a departure from the uniform application of this rule, a modification of the scope and intent of the rule as enunciated by this Court and a disregard of the fundamental principles of appellate procedure.

For these reasons and because of the importance of the questions involved, it is respectfully submitted that the prayer of the Petitioner should be granted.

Respectfully submitted,

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APPENDIX "A."

Sections 649 and 700 of the Revised Statutes, as amended, provide:

> "Sec. 649. Issues of fact in civil cases in any district court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury." (U. S. C. title 28, Par. 773.)
>
> "Sec. 700. When an issue of fact in any civil cause in a district court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment." (U. S. C. title 28, Par. 875.)

APPENDIX "B."

General Findings of the District Court in Its Opinion (R. 31).

The findings of the District Court are set out in its opinion and are therefore general and not special. They were based on the evidence as follows:

> "From the evidence I find that the chains in question were all sold by the plaintiff to job-

bers and dealers, so that even the plaintiff did not know, and could not know, how many of the chains thus sold were eventually used or purchased for use on non-taxable vehicles; that said chains generally were advertised by the plaintiff for use on non-taxable vehicles, as well as taxable ones; that said chains were manufactured in a multitude of sizes, varying not only in length of the side or rim chain, but also in the length of the cross chain, and generally heavier wire was used throughout in construction of the larger sizes. Of this number, however, 49 sizes which will be listed in Schedule 'A' hereinafter referred to, fitted at least one type of non-taxable vehicles equally as well as any taxable vehicle; that they operated as effectively upon the one class of vehicles as upon the other; that wholly without adaptation for the purpose they were interchangeable upon such vehicles of both classes as used tires of substantially the same size; that there was no differentiation either of construction or of design in the chains used on the tires of non-taxable vehicles from those used on tires of taxable vehicles; and that in ordering chains, the universal practice was to order by size only, without specification of the purpose, *i. e.*, whether for taxable or non-taxable vehicles (R. 30, 31). * * * I conclude that the chains listed in Schedule 'A' were not primarily adapted for use on taxable vehicles but were equally adapted for use on non-taxable vehicles. Although, as stated, the plaintiff did not and necessarily could not prove by direct evidence that any particular chain found its way to the wheel of a non-taxable vehicle, yet from the evidence that the sizes listed in Sched-

ule 'A' were adapted for such use and that it was common practice for all types of non-taxable vehicles generally to use such chains and indeed that the use of such chains was often required for the successful and efficient operation of such vehicles, I conclude that the sizes listed in Schedule 'A' were actually used on non-taxable vehicles and that such use was common, substantial and profitable—not exceptional or experimental only (R. 31). . . . The list of sizes, 49 in number, for which a non-taxable use was shown, together with the amounts of taxes paid on all chains of each such size, sold during each of the three taxable periods, are shown on Schedule 'A' which may be attached hereto and shall constitute a part of the findings herein" (R. 32).

The non-taxable vehicles referred to by the District Court were of four classes:

1. Tractors that are made non-taxable by the statute.

2. Fire engines and fire apparatus, which were found to be non-taxable in *American-La France Fire Engine Co.* v. *Riordan*, 6 Fed. (2d) 964. That decision was by the Second Circuit Court of Appeals and not reversed by this Court. The Regulations were amended to accord therewith, T. D. 3782, IV 50-2497.

3. Self-propelling machines, such as concrete mixers, stone crushers, etc., and machines which perform a mechanical function as they move along the highway, such as road graders and scrapers, sprinklers, etc., which are held to be non-taxable under Regulations 47, Article 12. (Appendix F.)

4. Motor-driven station and factory trucks for use in factory yards and railroad stations, and not on highways and roads, are held non-taxable by Regulations 47, Article 12. (Appendix F.)

That the above vehicles are those that are held by the District Court to be non-taxable, is shown by the following (R. 34):

> "Thus by express provision of the act, by judicial decision, and by Treasury Regulations, certain types of automotive vehicles are held to be exempt from the excise tax. It is to such vehicles, of course, that I had reference when in the findings of fact above I used the term 'non-taxable' vehicles, and for brevity I shall use the phrase in the same meaning throughout this opinion. Similarly, the words 'taxable vehicles' will be used to denote all vehicles subject to tax under this act."

The District Court set out the statute in its opinion (R. 33) and the Regulations 47 (R. 35). The District Court further found (R. 36):

> "At the outset it must be noted that the act does not impose a tax upon *accessories*. Instead the tax attaches only to the sales of '*accessories for any of the articles enumerated*', i. e., taxable vehicles." (Italics supplied.)

APPENDIX "C."

Although the Petitioner contends that there were no special findings and for that reason the Court of Appeals could not review the sufficiency of the facts found, yet for the information of this Court reference is made to the following in the record showing:

(*a*) *Evidence proving that Weed chains were not especially designed for use on automobiles and trucks.*

Weed Tire Chains were not made especially for tractors, automobiles or trucks (R. 180, 227); that during the taxable period chains were not purchased as designated for tires of tractors or automobiles, but were bought by sizes (R. 190); that Weed Tire Chains used on automobiles and trucks had no peculiar characteristics or design which were not identical to Weed Chains for use on tractors, fire apparatus and road machines, the general design being the same and differing only in weight as the size of the chain increases (R. 203, 212, 241, 127, 221); that there was no tire chain specially made for a tractor, but the chain in existence at the time of the advent of the tractor was applied to the tractor (R. 209, 236, 257); that there was nothing to prevent the use of the usual car tire chain on a truck or a pneumatic truck tire chain, on a solid tire, or a single or dual, other than the weight of the material used in construction of the chain (R. 212); that Weed Tire Chains made during the taxable period were similar in design and make to those that are manufactured by the company at the present

time and would fit the standard make of tires of all automobiles, trucks, and road machines, regardless of their use (R. 124); that they could be detached from automobile and truck tires and used on the same size tires of tractors, fire apparatus or road machines without any change in the chains (R. 128, 221); that there was no difference in the kind of Weed Chains sold in one part of the United States and Canada from what was sold in any other part (R. 130); that Weed Chains were generally used on Walter snow fighters without inquiry being made as to whether they were especially designed for snow fighters and they performed the identical function as chains on an automobile, when the sizes that would fit the tire of the machines were used (R. 160, 161); that the company did not manufacture a chain especially designed and sold for trucks (R. 226, 227), or for use on fire equipment, or for use on self-propelling motor-driven machines (R. 190, 199, 228); that the chains which the company manufactured and sold for automobiles and trucks were of the same design generally as those which they manufactured and sold for tractors, road maintenance machines, and fire apparatus (R. 196). (The witnesses who testified to the above were residents of Minneapolis, Minnesota; Omaha, Nebraska; Kansas City, Missouri; Des Moines, Iowa; Chicago, Illinois; Atlantic Beach, Long Island; and Evanston, Illinois.)

(*b*) *Weed chains were equally adapted for and during the taxable period were commonly used on tractors, fire apparatus, and road machines as well as on automobiles and trucks.*

Weed Tire Chains were used on tractors and trucks; in ordering chains no distinction was made as to whether they were to be used on trucks or tractors (R. 163, 252); that in storing the chains, they did not keep those for trucks separate from those for tractors (R. 178) and no special barrels or bins were kept for storing chains to fill orders of State highway commissions for fire apparatus or police equipment (R. 248) and orders from State highway commissions for chains were filled out of regular stock as they were if they were orders for private automobiles or trucks (R. 248); that if an order came for a set of dual chains for tractors they would be taken off the same pile as if ordered for the same size truck (R. 179) there being no markings showing which were truck chains and which were tractor chains (R. 179); that Weed tire chains could be used on tractors and road equipment as well as on trucks and automobiles (R. 185); that they were used on Fordson tractors and International and Liberty trucks (R. 205); that they could be used as well on tractors as on automobiles (R. 209); that particular sizes of chains may be used on any type of vehicle having rubber tires, either solid or pneumatic, if the sizes were comparable (R. 217); that a Weed chain of a suitable size could be used just as well on a tractor as on a truck (R. 229, 252, 299, 127, 219); that Weed chains sold for use on fire apparatus, police and road equipment did not differ in any way from the Weed chains sold and used on private automobiles and trucks; that there were no peculiar characteristics about a Weed chain that prevented it from being sold for general use as a commercial commodity and which

made it primarily adapted only for use as a component part of a privately owned automobile or truck (R. 231, 232); that Weed chains were used for road maintenance and road equipment and for the fire department of Chicago and other municipalities and for tractors (R. 241); that the difference in Weed chains used on automobiles and those used on fire apparatus was primarily a difference of size (R. 147); that Weed chains were used on Fox rotary snow brooms (R. 154) and Walter snow fighters (R. 158) and a chain of appropriate size that will fit on an automobile or a truck could be used on a fire apparatus or road equipment equally as well (R. 220).

(c) *Weed chains were interchangeable and could be used equally as well on tires of automobiles, trucks, tractors, fire apparatus and road machines.*

Weed Tire Chains were interchangeable for use on automobiles and trucks or tractors, if the proper sizes were used, without any change in the chains (R. 164); that chains commonly used on trucks could be used on tractors without any substantial change (R. 168, 199); that in buying chains it was not specified that they were for use on tractors or trucks but they were used interchangeably (R. 178); that a Weed tire chain could be taken off a Pierce Arrow or the Liberty trucks and used on a Fordson tractor (R. 182); that a pair of Weed chains meant for a tractor could be used on a Packard car (R. 192); that a pair of chains used on a fire engine were used on a Ford (R. 166); that chains used on fire apparatus worked just as well on a Loco-

mobile (R. 170); that tire chains may be detached from automobile or truck tires and attached to tires of the same size on tractors, fire apparatus, road equipment vehicles, without any change or adaptation (R. 193, 203, 213, 231, 253, 274, 283, 128, 221); that specific sizes of Weed chains could be placed on tires requiring those sizes and that a 40 x 5 chain could be put on a 38 x 6 tire (R. 207); that the size on a truck and a tractor being the same, the truck chain would come right off the truck onto the tractor (R. 214) and you could interchange them providing the tire sizes are the same; that Weed Tire Chains were used on fire apparatus, tractors, road maintenance machines such as graders, snow plows, and similar vehicles including road sprinklers (R. 196); that Weed Chains used on fire apparatus and road equipment did not differ in any way from Weed Chains sold and used on private automobiles and trucks; they were interchangeable (R. 221).

APPENDIX "D."

The incorrectness of statements in the opinion of the Circuit Court of Appeals is proved by the following excerpts of evidence which comprise only a small part of the evidence directed to the proof of the facts referred to by the Court:

> William A. Palmer, General Foreman of Maintenance, District 9, of the State of Minnesota, testified (R. 163) that the regular stock Weed chains were used on tractors, and were ordered by sizes. He stated as follows:
>
> "We made no distinction as to whether they were to be used on trucks or tractors, just used them as we saw fit."

Walter J. Kretlow, a warehouse manager for the appellee, testified (R. 247):

"I filled orders for the City of Chicago designating delivery at 35th Street, and also on, I think, Loomis Street, out of our regular stock that we sold for automobiles, tractors and trucks, indiscriminately according to size."

George B. Kutz, salesman for the American Chain Company, testified (R. 252):

"A Weed chain of suitable size can be used as well on a tractor as on a truck. I sold chains that were put to use on tractors. I took orders for chains for the jobbers. I have sold chains for use on tractors, fire apparatus and road equipment used in the construction and maintenance of roads."

and, on page 253, he testified,

"Weed chains for use on automobiles and trucks have no peculiar characteristics which are not identical with Weed chains for use on tractors, fire apparatus or road equipment. Weed chains may be detached from automobile and truck tires and used on tires of the same size on tractors, fire apparatus or road equipment without any change in the chains. The Weed chains sold by me during the taxable period in my territory for use on fire apparatus, police and road equipment did not differ in any way from the Weed chains sold and used on private automobiles and trucks."

William E. Wissler, engaged in the wholesale automotive business at Des Moines, testified (R. 231):

"Weed chains for use on automobiles and trucks have no peculiar characteristics which are not identical with Weed chains for use on tractors, fire apparatus, or road equipment. Weed chains may be detached from automobiles or truck tires and used on tires of the same size on tractors, fire apparatus or road equipment without any change in the chains."

APPENDIX "E."

Section 424 of the Revenue Act of 1928 reads as follows:

(*a*) No refund shall be made of any amount paid by or collected from any manufacturer, producer, or importer in respect of the tax imposed by subdivision (3) of section 600 of the Revenue Act of 1924, or subdivision (3) of section 900 of the Revenue Act of 1921 or of the Revenue Act of 1918, unless either—

(1) Pursuant to a judgment of a court in an action duly begun prior to April 30, 1928; or

(2) It is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of an article subject to tax, or that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him; or

(3) The Commissioner certifies to the proper disbursing officer that such manufacturer, producer, or importer has filed with the Commissioner, under regulations prescribed by the Commissioner with the approval of the Secretary, a bond in such sum and with such sureties as the Commissioner deems necessary, conditioned upon the immediate repayment to the

United States of such portion of the amount refunded as is not distributed by such manufacturer, producer, or importer within six months after the date of the payment of the refund, to the persons who purchased for purposes of consumption (whether from such manufacturer, producer, importer, or from any other person) the articles in respect of which the refund is made, as evidenced by the affidavits (in such form and containing such statements as the Commissioner may prescribe) of such purchasers, and that such bond, in the case of a claim allowed after February 28, 1927, was filed before the allowance of the claim by the Commissioner.

(*b*) The second proviso under the heading "Internal Revenue" in section 1 of the First Deficiency Act, fiscal year 1928, and the second proviso of the fourth paragraph under the heading "Internal Revenue Service" in section 1 of the Treasury and Post Office Appropriation Act for the fiscal year 1929, are repealed.

APPENDIX "F."

Regulations 47.

Article 12. Excise Tax Regulations (Revised December 1920).

"Art. 12. Automobile trucks and automobile wagons.—The tax is 3 per cent of the price for which automobile trucks and automobile wagons are sold by the manufacturer. It applies to automobile trucks and automobile wagons primarily designed or adapted for the transportation of property along highways and roads, although persons may incidentally be transported at the same time, as outlined in article 11, and to automobile truck and automobile wagon chassis as defined in article 15.

"For example, fire apparatus, including fire engines, hose carts, hook and ladder trucks, water-tower trucks, etc., tank trucks for carrying oil, gasoline, water, etc., moving and furniture vans, and drays, delivery wagons, etc., are all taxable as automobile trucks, and wagons. Automobile hearses are taxable as automobile trucks or automobile wagons.

"An automobile truck or automobile wagon formed by joining together a so-called tractor or 'semitractor' which carries or bears a portion of the load, and a so-called trailer or 'semitrailer' is taxable as a whole as an automobile truck or an automobile wagon.

"When sold separately the so-called tractor or 'semitractor' is taxable as an automobile truck or automobile wagon, and the so-called trailer or 'semitrailer' as a 'part' of an automobile truck or automobile wagon.

"Motor-driven machines for pulling or drawing vehicles around factories and railroad stations, small trucks for handling baggage and trunks at railway stations and for transporting materials, articles, or goods around factories and adapted for restricted use in factory yards or elsewhere as distinguished from use on highways and roads, are not subject to tax.

"Self-propelling motor-driven machines, such as concrete mixers, stone crushers, excavating shovels, ditch diggers, etc., and machines which perform a mechanical function as they move along highways and roads, such as road graders, road scrapers, street sweepers, road sprinklers and oilers, are not taxable. Where, however, the mechanical part of a machine, as the mixing machine of a concrete mixer, the blades of a road scraper, the tank of a street sprinkler or the boiler of a road oiler, is superimposed or mounted on a truck chassis, the chassis is taxable at 3 per cent when sold by the manufacturer.

"Motor propelled wheel or rolling chairs, motor-driven machine gun and artillery carriages of the trac-

tor type, motor-driven railroad cars and vehicles designed and adapted solely for use on rails or tracks, and not capable of use on highways and roads, are not taxable.

"Any tires, inner tubes, parts or accessories for automobile trucks and automobile wagons sold on or in connection therewith or with the sale thereof are taxable at 3 per cent as part of the selling price of the automobile truck or automobile wagon. This applies only to such tires, inner tubes, parts or accessories as are not in excess of the quantities usually sold in the ordinary course of trade to a single customer at the time and in connection with the sale of an automobile truck or an automobile wagon. Any quantity of tires, inner tubes, parts or accessories in excess of this amount is taxable under subdivision (3) at 5 per cent of the selling price thereof.

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1933

No. 196

AMERICAN CHAIN COMPANY, INC., PETITIONER,

vs.

ROBERT O. EATON, COLLECTOR OF INTERNAL REVENUE, DISTRICT OF CONNECTICUT, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF OF PETITIONER.

Conflict of Decisions in the Circuit Courts of Appeals.

Among the reasons set out by the Rules of this Court which will be considered in connection with the granting of a writ of certiorari is where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter, or has decided an important question of Federal law which has not been, but should be, settled by this Court (Rule 38).

That there is such a conflict between the circuit courts of appeals is shown by the petition for certiorari in No. 329, *Routzahn* v. *Willard Storage Battery Co.* The same general questions relating to Federal tax laws are involved in that case. The petition in that case states (p. 8):

> "There is thus a conflict between circuit courts of appeals as to the meaning to be given to the term 'primarily adapted.' This is an important question

> of law which should be settled. Aside from the large amount of taxes involved in this particular case, there are many other pending cases involving large sums which present the same general question. The question is therefore one of large public interest and of great importance in the administration of the revenue laws."

Nevertheless, counsel for respondent, admitting that there is a question of general law of large public interest and of great importance in the administration of the revenue laws, opposes certiorari in the instant case, while asking this Court to grant the petition for certiorari in No. 329.

The instant case was tried in the District Court of Connecticut (58 Fed. (2d) 246) and the decision was against the Government. It was reversed in the Second Circuit Court of Appeals (63 Fed. (2d) 783) and the decision of that circuit is the only case involving these questions decided in favor of the Government by any circuit court of appeals.

In No. 329, five cases were commenced in the District Court for the Northern District of Ohio, and decided against the Government. They were consolidated on appeal to the Sixth Circuit and decided against the Government (65 Fed. (2d) 89).

Other cases involving the same general questions here presented are: *Electric Storage Battery Company* v. *McCaughn*, 52 Fed. (2d) 205, decided against the Government in the Eastern District of Pennsylvania and affirmed by the Third Circuit Court of Appeals (63 Fed. (2d) 715). In that case, however, no petition for certiorari was presented to this Court and the judgment of the circuit court of appeals has *become final*.

Jefferson Electric Manufacturing Company v. *United States* was decided by the Court of Claims in favor of the claimant (69 C. Cls. 150; 38 Fed. (2d) 139). Petition for certiorari on behalf of the Government is pending in this Court (No. 171).

In a footnote on page 9 of the Petition in No. 329 counsel quotes the Treasury Department to the effect that there

are ninety eight cases pending in the courts involving over $5,000,000.00 in taxes and additional interest of more than $2,000,000.00 and yet counsel for respondent seeks petition for certiorari only in cases that have been decided against the Government and opposes certiorari in the one case that has been decided in favor of the Government. Both questions set out on page 2 in petition in No. 329 are involved in this case. The district court decided both in favor of the petitioner. The court of appeals decided the "chief use" question against petitioner and did not pass on Section 424 of the Revenue Act of 1928.

The Findings of Fact.

Petitioner does not concede that the findings of the district court were special findings, but admitting only for the purposes of argument that they were special findings, the Circuit Court of Appeals was nevertheless limited in reviewing the case "to the determination of the sufficiency of the facts found to support the judgment" (Petition 37).

The respondent in his opposing brief takes issue with the petitioner on the point as to whether the findings of the district court were general or special. Petitioner contends that they were general, because they were parts of the opinion, and that the court had no power by its order to make findings that were general into special findings. This point has been argued in petitioner's supporting brief and need not be repeated here.

Respondent claims that the findings of the district court were special and for that reason the court of appeals had authority to examine the evidence and determine whether that evidence supported the judgment entered by the district court in favor of the petitioner. Respondent takes this position after the admission found on page 6 of his brief which is as follows:

> "In the instant case the trial judge sitting without a jury in accordance with a written stipulation found all

> of the facts in respect of the chains involved *necessary to the legal conclusion which he reached.*"

After this admission, respondent, on page 7, says:

> "The findings thus set forth were consequently special findings within the meaning of the statute and the Circuit Court of Appeals under Section 700 *could determine the sufficiency of the evidence to support the judgment.*"

Respondent also states on page 12:

> "There is no substantial doubt that the court had power *to review the evidence.*"

The above quotations (italics ours) show that respondent insists that under Section 700, where the findings are special, the appellate court may consider the evidence introduced on the trial. This is not the import of Section 700 (Petition 37). The part of said section referring to special findings is as follows:

> "And when the finding is special the review may extend to the determination of the sufficiency of the facts *found* to support the judgment."

An appellate court cannot go behind such findings of the trial court. There is no authority anywhere, even though the findings are *special*, for an appellate court to consider the sufficiency of the evidence. Its duty is confined to a determination of the sufficiency of the facts *found* to support the judgment. As the respondent has admitted in its brief, as above stated (page 6), that the trial court found "all of the facts in respect of the chains involved necessary to the legal conclusion which he reached," the court of appeals had no authority to go behind the findings of the trial court.

In *Anglo-American, etc., Co.* v. *Lombard* (132 F. 721, 733), Justice Van Devanter, then Circuit Judge, speaking for the Circuit Court of Appeals for the Eighth Circuit, said:

> "In actions at law, where a trial by jury is waived, the duty of finding the facts is placed upon the trial court. We have no authority to examine the evidence for the purpose of finding the ultimate facts, or of correcting or completing a special finding which is imperfect or incomplete." (Citing cases.)

(Certiorari denied, 196 U. S. 638, 49 L. Ed. 630.)

In *Electric Reduction Co.* v. *Lewellyn, Collector of Internal Revenue* (8 Fed. (2d) 91), the District Court for the Western District of Pennsylvania made special findings of fact and gave judgment for the defendant. The Circuit Court of Appeals (11 Fed. (2d) 493) reversed the district court, but this Court in 275 U. S. 243, 72 L. Ed. 262, sustained the district court and reversed the court of appeals, using the following language:

> "A trial by jury having been waived in writing, our review in this case is limited to the sufficiency of the *facts specially found* to suppo the judgment, and to the rulings excepted to and presented by the bill of exceptions." (Italics ours.)

In *Ingram-Day Lbr. Co.* v. *McLouth*, 275 U. S. 471; 72 L. Ed. 378, this Court said:

> "Since a jury was waived in writing, appellate review is limited to the sufficiency of the *facts specially found* to support the judgment and to rulings excepted to and presented by a bill of exceptions." (Italics ours.)

In *U. S.* v. *U. S. F. & G. Co.*, 236 U. S. 527, 59 L. Ed. 703, this Court said:

> "Assuming these defenses were properly pleaded, we still need spend no time upon them, since the argument made here to support them is based not upon the findings, but upon a general review of the evidence and a series of inferences drawn from it that are inconsistent with the facts as found by the trial court.

> The findings have the same effect as the verdict of a jury, and this court does not revise them, but merely determines whether they support the judgment."

In this jury-waived case the district court could make either general or special findings. Petitioner contends that its findings were general, because they were part of the opinion and this Court has said in *Fleischmann C. Co.* v. *Forsberg,* 270 U. S. 355, 70 L. Ed. 629 (Pet. 16), and *Harvey Company* v. *Malley,* 288 U. S. 415, 77 L. Ed. 621 (Pet. 20), that such findings are not special. If the findings are special as respondent contends, then the court of appeals could determine whether they support the judgment. The court of appeals could not either under general or special findings arrogate to itself the functions of a jury and pass upon the evidence.

Respondent's brief (P. 10) states that the decision below may be adequately rested on the ground that petitioner's chains were designed and primarily adapted for automobile use and that the conclusion to that effect is amply supported by the evidence. Even if the appellate court could make its own findings, the evidence fairly construed does not sustain the finding that the tire chains were designed and primarily adapted for use on automobiles, etc. The Parsons patent, being dated March 24, 1903, was prior to the Weed patent and was therefore the basic patent. It recited that the chain was applicable to the "wheels of vehicles, such as cycles and motor cars, but also to * * * pulleys, * * * friction rollers," and the like. (R. 40, 131).

Congress by enacting Revenue Act of 1932, Section 606 (c) (U. S. C. A., Title 26, Section 3601), in language different from the acts here involved, intended to change the law and gave a legislative construction of these acts that they do not include tire chains.

Petitioner contends that tire chains were not intended to be taxed by the acts of Congress here involved, because of

the change in the language used in the enactment of the Revenue Act of 1932 wherein tire chains were specifically named (Petition 11, Reason 6).

In *Brewster* v. *Gage*, 280 U. S. 327, 74 L. Ed. 457, this Court had under consideration the Revenue Act of 1918 and the meaning of the word "acquired" in connection with the taxation of certain stocks received on distribution of an estate. The 1918 Act used the word "acquired," while the 1921 Act provided "time of such acquisition." Regulations promulgated under the two acts were substantially the same. This Court held:

> "The substantial re-enactment in later acts of the provision theretofore construed by the department is persuasive evidence of legislative approval of the regulation" (citing cases), but the court then said:
>
> "The deliberate selection of language so differing from that used in the earlier acts indicates that a change of law was intended."

The Revenue Acts of 1921 and 1924, under which tire chains were taxed, subjected to a tax "tires, inner tubes, *parts or accessories for* automobile trucks, automobile wagons, other automobiles and motorcycles (except tractors) sold to any person other than a manufacturer or producer of said last named articles." The 1924 Act was repealed in 1926. In enacting the Revenue Act of 1932, Congress intended to tax tire chains and used different language, as follows:

> "There is hereby imposed * * * a tax * * *:
>
> (*c*) Parts or accessories * * * For the purposes of this subsection and subsections (*a*) and (*b*), spark plugs, storage batteries, leaf springs, coils, timers, and *tire chains*, which are suitable for use on or in connection with, or as component parts of, any of the articles enumerated in subsection (*a*) or (*b*) shall be considered parts or accessories for such articles, whether or not primarily adapted for such use." (Italics ours.)

The Senate Committee in its Report No. 665, 72d Congress (H. R. 10236, p. 44), states:

> "The House bill contained a provision, which is retained by your Committee, to eliminate the effect of certain court decisions under which many parts and accessories have escaped tax under prior revenue acts on the ground that they were not 'primarily adapted' for use on automobiles or trucks, since they might be used on boats, tractors, etc. Under the bill, spark plugs, storage batteries, leaf springs, coils, timers, and *tire chains*, if suitable for use on automobiles and trucks, will be taxable as parts or accessories whether or not 'primarily adapted' for such use." (Italics ours.)

This shows a clear intention to change the laws here involved and is evidence that the Congress did not under the old laws intend that chains not "primarily adapted" for use on automobiles should be subject to the tax.

Applying the language of this Court to the instant case, Congress, in the 1932 Revenue Act, deliberately selected language differing from that used in the earlier acts, indicating that a change of law was intended, and tire chains, not taxable under prior acts of Congress, are intended to be taxed under the 1932 Act.

Petitioner contends that this Court should grant its petition for certiorari.

Respectfully submitted.

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FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 196

AMERICAN CHAIN COMPANY, INC., Petitioner,

vs.

ROBERT O. LOOK, Commissioner of Internal Revenue,
District of Connecticut, Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

SUPPLEMENTARY STATEMENT OF MATTERS INVOLVED

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DAVID E. RAY,
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CHARLES D. ROSENBERG,
HAROLD M. KINMONTH,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 196

AMERICAN CHAIN COMPANY, INC., PETITIONER,

vs.

ROBERT O. EATON, COLLECTOR OF INTERNAL REVENUE, DISTRICT OF CONNECTICUT, RESPONDENT.

SUPPLEMENTARY BRIEF OF PETITIONER

Statement of Facts.

The three consolidated actions before this Court, which are identical except that they cover different taxable years, were brought by the petitioner to the United States District Court of Connecticut for the recovery of excise taxes alleged to have been illegally assessed and collected under Section 900 of the Revenue Act of 1921 and Section 600 of the Revenue Act of 1924.

Section 900 of the Revenue Act of 1921, with which Section 600 of the Revenue Act of 1924 is substantially identical, reads as follows:

> "That from and after January 1, 1922, there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer,

or importer, a tax equivalent to the following percentages of the price for which so sold or leased—

"(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;

"(2) Other automobiles and motor cycles (including tires, inner tubes, parts and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;

"(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum;"

Prior to the bringing of these actions, by decisions of court and departmental rulings, the taxable types of automotive vehicles were limited to vehicles primarily designed for the transportation of passengers and property on highways, eliminating all automotive vehicles primarily designed for performing mechanical functions such as fire-fighting engines and apparatus, snow plows, road scrapers, road graders and street sprinklers. Tractors were specifically exempted by the Act. As a result, the only types of commercial vehicle subject to the tax were passenger automobiles and trucks.

Through administrative regulations as interpreted by this Court in *Universal Battery Company* v. *United States*, 281 U. S. 580, it was established that the basis of classification of manufactured articles as parts or accessories of automotive vehicles taxable under the above Revenue Acts was their relation to such vehicles, and that articles of manufacture primarily adapted for use on taxable motor vehicles must be classified as parts or accessories therefor, even though they had some other use for which they were not so well adapted, while articles of manufacture equally

adapted for a variety of uses and commonly put to such uses, one of which was with relation to taxable types of motor vehicles, are not subject to classification as parts or accessories.

It will be noted that the opinion in *Universal Battery Company* v. *United States* above cited, in discussing primary adaptation, equal adaptation and common use, employs the general term *motor vehicles.* In view of the prior specific statement by the court that the motor vehicles referred to in the Acts were those enumerated, it is evident that the term "motor vehicles" was used by the court as referring only to the types of motor vehicles enumerated in the Acts.

In the present actions the issues joined in the district court were as follows:

First, the petitioner alleged and the respondent denied that the tire chains on which the taxes had been assessed and paid were not primarily adapted for use on the taxable types of automotive vehicles enumerated in the Acts, but were equally adapted for use on various types of non-taxable automotive vehicles, namely, tractors, fire engines, snow plows, road scrapers, road graders and sprinklers.

Second, the respondent by motion to dismiss and motion for judgment raised the issue that Section 424 of the Revenue Act of 1928 precluded the court from taking jurisdiction of the actions, or of rendering judgment for the respondent. The petitioner alleged in the complaints that the taxes paid had been absorbed without increase of selling price and without passing it on to purchasers,—which allegation was denied by the respondent.

Upon this issue of law raised by the respondent, the petitioner claimed that the district court not only had jurisdiction of the actions, but the authority to determine as an issue of fact whether or not the taxes had been passed on.

Upon the trial in the district court the petitioner offered the evidence of forty-six witnesses, including its own executive officers and district managers, independent jobbers and dealers, manufacturers of fire equipment, of tractors and snow plows, and officials of municipal fire departments, —the field of observation of which witnesses covered the greater part of the country.

Through this evidence it was proved that the tire chains manufactured by the petitioner were designed and adapted generally for automobiles, trucks and the specific types of non-taxable vehicles specified above; that the chains were generally advertised for use on non-taxable as well as taxable types of vehicles; that with few exceptions the chains were sold to jobbers who in turn resold them to retailers, who in turn resold them to the trade; that the tire chains were bought by the trade by numbers and sizes without designation of intended use; that the same types of chains were used on taxable and non-taxable types of automotive vehicles without changes or adjustments; that the chains were inter-changeable between taxable and non-taxable vehicles using the same sizes of tires, and in actual practice were interchanged; and that the use of the chains on the non-taxable types of automotive vehicles was a common and substantial use. The evidence also established the fact that at the instant of sale, when the tax became effective, there was no means of determining the ultimate use of any particular set of chains.

The petitioner also offered evidence that it assumed the economic burden of the tax without imposing the same upon the purchasers of its chains.

Upon the trial, the District Court ruled that any recovery by the petitioner would be limited to specific sizes of chains with respect to which equality of adaptation for and common use on non-taxable vehicles was proved. Of the total number of sizes of chains manufactured by the peti-

tioner, there were a few not specifically covered by this proof, representing a comparatively small number of the chains sold and the taxes upon these sizes amounted to less than three per cent of the total taxes paid. Hereafter in this brief references to the petitioner's chains will include only the forty-nine sizes upon which recovery was allowed by the District Court.

The respondent offered no evidence which in any material respect controverted that offered by the petitioner.

In rendering judgment for the petitioner the District Court found the subordinate facts substantially in accord with the evidence offered by the petitioner, and from these subordinate facts drew the conclusions upon which its decision was predicated, namely, that the chains which had been subjected to the tax were not primarily adapted for use on the types of automotive vehicles enumerated in the Revenue Acts of 1921 and 1924, but were equally adapted for use on various types of vehicles not included in the Acts and were commonly so used. The District Court also found for the plaintiff upon the issue of fact raised under Section 424 of the Revenue Act of 1928.

The respondent in its appeal to the Circuit Court of Appeals, in its assignment of errors, did not question the correctness of this latter finding by the District Court.

Upon appeal by the respondent to the Circuit Court of Appeals for the Second Circuit, that Court in reversing the judgment of the District Court, found as a fact, without adequate support in the finding by the trial court, that the chief or principal use of petitioner's chains was for taxable types of automotive vehicles, and then held as a conclusion of law that chief use was determinative of primary adaptation.

The Circuit Court of Appeals also overruled certain essential findings of fact in the opinion of the District Court,

and substituted therefor conflicting findings of fact from which it drew supporting conclusions at variance with those of the District Court.

The issue under Section 424 of the Revenue Act of 1928 was not passed upon in the opinion of the Circuit Court of Appeals.

The questions which will be discussed in this brief are:

(1) The question of chief use;
(2) The issue raised under Section 424 of the Revenue Act of 1928;
(3) The findings of fact of the Circuit Court of Appeals claimed by petitioner to be erroneous and without authority.

ARGUMENT.

I.

Chief Use.

The Circuit Court of Appeals erred in applying the doctrine of chief use, first, because there is no adequate support in the Record for the finding of chief use as a fact, and, second, the doctrine of chief use is not applicable as a principle of law in the determination of primary adaptation.

The evidence offered in the District Court of the general custom of the purchase of chains by numbers and sizes, and not for specific purposes, demonstrated the impossibility of ascertaining the numbers of chains used by the different types of automotive vehicles. The only findings of the trial court on this question are as follows:

> "From the evidence I find that the chains in question were all sold by the plaintiff to jobbers and deal-

ers, so that even the plaintiff did not know, and could not know, how many of the chains thus sold were eventually used or purchased for use on non-taxable vehicles"; (R. 18.)

"It may also be noted that the number of taxable vehicles during the taxable periods exceeded the number of non-taxable motor vehicles. If that fact was not fully established by competent evidence, at least it was conceded by the plaintiff on brief." (R. 19.)

The District Court also refused to find in each of the three cases findings requested by the respondent that the chief or principal use of petitioner's tire chains was on the tires of automobiles, trucks, automobile wagons and other automobiles (R. 38).

Although there was no finding by the District Court on the question of comparative use as between taxable and non-taxable vehicles, the evidence indicated the fact that the use on tractors, fire equipment and snow plows was more continuous than on the taxable types of vehicles, such as trucks and automobiles (R. 90, 96, 98).

The Circuit Court of Appeals has predicated its finding of chief use upon an undefined preponderance in number of taxable vehicles over non-taxable vehicles with no finding of fact by either court as to comparative use of chains as between non-taxable and taxable vehicles, and the only available evidence indicating a more extensive use of chains on non-taxable than on taxable vehicles. Such a finding by the Circuit Court of Appeals is not justified.

The doctrine of chief use as a principle of legal application originated in the administration of the tariff laws which employ the terms "chief use," "chief value," "chief content" and other equivalents as methods of classification.

In *Magone* v. *Wiederer,* 159 U. S. 555, the term "chief use" was stated to be "a vague and uncertain term." In

that case and the earlier case of *Magone* v. *Heller*, 150 U. S. 70, where the factual conditions were sufficiently different from those before the court in this case as to prevent the conclusions of the court being an exact precedent, the underlying theory of the two opinions is that in the classification of a specific article, chief use for a particular purpose ceases to be controlling when the article has commercially a common or general use for another purpose. The logic of the proposition is simple. A tire chain equally adapted for use on an automobile and a tractor and commonly used for each purpose is no more an accessory for one than it is for the other,—otherwise the term "accessories or parts" would be given a broader interpretation than can be accorded to the specifically enumerated types of automotive vehicles which the term "parts or accessories" qualifies.

The present contention of the respondent would require the same interpretation of the Acts as would be accorded if the Acts expressly made subject to the tax accessories and parts of all motor vehicles instead of accessories and parts of the enumerated motor vehicles. That the initial understanding of the scope of the Acts by the Commissioner accorded with that advanced by the petitioner is indicated by the language used in Regulations 47 (Revised Dec., 1921), Article 15, in defining "parts":

> Art. 15. Definition of parts.—A "part" for an automobile truck, automobile wagon, other automobile, or motor cycle is any article designed or manufactured for the special purpose of being used as or to replace a component part of any such vehicle and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use and which is primarily adapted only for use as a component part of such vehicle.

The adoption of the interpretation now claimed by the respondent would constitute a denial of the established doctrine that tax laws must be construed strictly against the Government and in favor of the taxpayer and that the Courts are limited by the clear import of the literal words used. In 1926, Section 600 of the Revenue Act of 1924 was repealed and in the Revenue Act of 1932, Section 606, Congress, in imposing a new automobile excise tax, has in specific terms made tire chains, storage batteries, ignition coils and various other articles then held by Court decisions to be non-taxable under former Acts, subject to classification as parts or accessories "when suitable for use on or in connection with" the taxable types of motor vehicles which are subject to the tax "whether or not primarily adapted for such use."

This evidences a legislative recognition of the non-taxability of these articles under the former Acts.

In view of the interpretation of the provisions of the former Acts by Departmental Regulations, and the decision of this Court in the Universal Battery case, there was at the date of the adoption of the 1932 Act no ambiguity in the law which would permit the use of the 1932 Act in ascertaining the intention expressed in the 1921 and 1924 Acts. If there had been it is clear that under the established rules the action on the part of Congress in specifically enlarging the scope of the former Acts would be interpreted as an intent to change the original law.

United States v. *Woodruff*, 175 Fed. 776.
Brewster v. *Gage*, 280 U. S. 327.

Under the ordinary rules of terminology, chief use of a manufactured article for one purpose is in no way inconsistent with equal adaptation or common use for another purpose. The principal use of shot guns is in the pursuit of game, but shot guns are equally adapted for and com-

monly used in shooting clay pigeons and other moving targets.

Primary adaptation, equality of adaptation and common use are methods of classification which can be applied with reasonable certainty.

Chief use, unless given a more accurate definition than hitherto, would be an inaccurate method of classifying manufactured articles destined to pass through the hands of jobbers, wholesalers and retailers to the ultimate consumer who customarily purchases the article without designation of its intended use.

The present case differs from the cases of *Routzahn* v. *Willard Storage Battery Company,* No. 329, and *United States* v. *Jefferson Electric Manufacturing Company,* No. 171, only to the extent that the commercial use of tire chains is limited to motor vehicles, while in those cases uses for purposes other than motor vehicles were found. The petitioner's contention is that this is not a material distinction. Common use for non-taxable purposes is an issue of fact to be determined by a trial Court upon the evidence. The non-taxable uses of an article restricted to various types of automotive vehicles may well be more common and substantial uses than the non-taxable uses of a different article employed in other connections than for automotive vehicles.

The Circuit Court of Appeals for the Second Circuit is the only Circuit Court of Appeals which has applied the doctrine of chief use in this class of cases.

In the case of *McCaughn* v. *Electric Storage Battery Company,* 63 Fed. (2d) 715, the Circuit Court of Appeals for the Third Circuit in passing upon this issue said:

> "The fact that automobiles are the largest users of storage batteries, is not decisive of the case. That they are the largest users is a fact, but taxability of a battery under this statute depends, not upon the quan-

tity used, but upon whether or not it is primarily adapted for use in an automobile and not equally adapted to any other use requiring the same load. Unless it fulfills these two requirements, it is not a 'part or accessory' within the meaning of this statute. Judge Kirkpatrick, who saw the witnesses and heard all the testimony, has expressly found it is not and the testimony, fairly interpreted, as a whole and not fragmentarily, abundantly supports his findings. These findings being supported by the evidence, are, under the facts of this case conclusive upon us."

The Court of Claims in *Anthony Co.* v. *United States,* 56 Fed. (2d) 481, said:

"It is especially urged on behalf of the defendant that the question of whether or not an article is an automobile accessory depends on the relative quantity thereof used in connection with automobiles and used for other purposes, or, as stated in the brief of defendant, the matter of the 'primary adaptability of the air pumps is to be determined with reference to the percentage of the sum total of air pressure made use of for various commercial purposes.' But this is not the rule. Evidence as to the proportionate number used is relevant but not at all controlling—in fact, it is of comparatively little weight. If the rule were otherwise, then the mere fact that somewhere from ten to fifty times as many spark plugs are used in automobiles as for all other purposes combined would be sufficient by itself to show that they were to be regarded as an automobile accessory."

The case of *Perfection Gear Co.* v. *United States,* 41 Fed. (2d) 561, relied upon by the Circuit Court of Appeals, is not in point. In that case the court found that the articles in question (timing gears) were specially designed and primarily adapted for automobiles and trucks, thus giving them a classification as accessories therefor. The court

then held that in such circumstances a taxpayer was liable for the tax on all of the timing gears manufactured and sold, excepting those which the taxpayer could definitely prove were employed in a non-taxable use, in accordance with Regulations 47, Revised, Article 16, which provided that on an article primarily adapted for the taxable types of motor vehicles, the taxpayer could be relieved of the tax to the extent that he could prove sales for non-taxable uses.

II.

Section 424 of the Revenue Act of 1928 does not preclude recoveries in the present actions.

Section 424 of the Revenue Act of 1928 reads as follows:

> (*a*) No refund shall be made of any amount paid by or collected from any manufacturer, producer, or importer in respect of the tax imposed by subdivision (3) of Section 600 of the Revenue Act of 1924, or subdivision (3) of Section 900 of the Revenue Act of 1921 or of the Revenue Act of 1918, unless either—
>
> (1) Pursuant to a judgment of a court in an action duly begun prior to April 30, 1928; or
>
> (2) It is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of an article subject to tax, or that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him; or
>
> (3) The Commissioner certifies to the proper disbursing officer that such manufacturer, producer, or importer has filed with the Commissioner, under regulations prescribed by the Commissioner with the approval of the Secretary, a bond in such sum and with such sureties as the Commissioner deems necessary, conditioned upon the immediate repayment to the United States of such portion of the amount refunded

as is not distributed by such manufacturer, producer, or importer within six months after the date of the payment of the refund, to the persons who purchased for purposes of consumption (whether from such manufacturer, producer, importer, or from any other person) the articles in respect of which the refund is made, as evidenced by the affidavits (in such form and containing such statements as the Commissioner may prescribe) of such purchasers, and that such bond, in the case of a claim allowed after February 28, 1927, was filed before the allowance of the claim by the Commissioner.

(b) The second proviso under the heading "Internal Revenue" in Section 1 of the First Deficiency Act, fiscal year 1928, and the second proviso of the fourth paragraph under the heading "Internal Revenue Service" in Section 1 of the Treasury and Post Office Appropriation Act for the fiscal year 1929, are repealed.

Two motions to dismiss these cases for lack of jurisdiction were made by respondent. The first (R. 5) was denied by District Judge Thomas in an opinion (R. 6). The motion was renewed at the trial (R. 13) and denied by the trial court (R. 31) for reasons given in the opinion.

The respondent contends that the District Court had no jurisdiction to entertain the present actions and render judgment for the petitioner, first, because the actions were not brought prior to April 30, 1928, and, second, because the determination of the questions involved in paragraphs (2) and (3) of Section 424 are exclusively vested in the Commissioner.

The requirement of bringing suit prior to April 30, 1928, if construed as a bar to the present actions, would be unconstitutional.

The date of the passage of the Revenue Act of 1928 was May 29, 1928, and the limitation for the bringing of actions

was April 30, 1928,—anterior in time to the enactment of the Act.

In each of the three present actions, the rejection by the Commissioner of Internal Revenue of the claims for refund which, under Section 3226 of the Revised Statutes, as amended by Section 1113, Revenue Act of 1928, was a prerequisite to the bringing of any action, was made prior to April 30, 1928—the rejection in case No. 3360 being July 5, 1927—the rejection in case No. 3371 being August 23, 1927—and the rejection in case No. 3421 being March 15, 1928 (R. 3, 46, 59).

On the date of the passage of the Act, the petitioner in each of these three cases had a right of action, either against the Collector of Internal Revenue in the District Court, or against the United States in the Court of Claims, with a limitation of time for the bringing of such action of more than one year. Obviously, Congress could shorten this period of limitation, but it could not prescribe a limitation expiring prior to the date of the passage of the Act.

Koshkonong v. *Burton*, 104 U. S. 668;
Federal Grain Co. v. *United States*, 35 Fed. (2d) 260.

The provisions of subdivisions (2) and (3) of Section 424 of the Revenue Act of 1928 did not prevent the maintenance of the present actions or the rendering of judgment therein.

In *Routzahn* v. *Willard Storage Battery Co.*, 65 Fed. (2d) 89, and *Electric Storage Battery Co.* v. *McCaughn*, 52 Fed. (2d) 205, affirmed 63 Fed. (2d) 715, it was held that the provisions of the Act did not prevent the maintenance of an action or the rendition of judgment against the Collector for an illegally assessed tax, but that the administrative decision of the Commissioner on the ques-

tion whether the tax was passed on to the purchaser was in such case deferred until claim is made for the payment of the judgment.

The cases of *Boyle Valve Co.* v. *United States,* 38 Fed. (2d) 135, and *Jefferson Electric Manufacturing Company* v. *United States,* 38 Fed. (2d) 139, held, as does the opinion of the trial court in the present actions, that the question as to whether or not the tax has been passed on to the purchaser is a proper subject for the determination of the court on the trial of the action for the recovery of the tax.

The only judicial decisions in which the respondent's contention that the court was without jurisdiction to entertain actions for recovery of the tax are:

Sterling Spring Co. v. *Routzahn* (N. D. Ohio, not officially reported but found VIII-2 Cumulative Bulletin 358).

Twentieth Century Manufacturing Co. v. *Hopkins* (N. D. Texas, not officially reported but found X-2 Cumulative Bulletin 408).

In *Routzahn* v. *Willard Storage Battery Co.,* above cited, an opinion was rendered on December 16, 1929, denying the motion of the Collector in the District Court to dismiss on the ground of lack of jurisdiction, and in that opinion West, J., states that Jones, J., who wrote the opinion in *Sterling Spring Co.* v. *Routzahn,* cited above, advised him that he did not desire his decision in *Sterling Spring Company* v. *Routzahn* to be regarded as the law of the district. This decision is not officially reported, but may be found in 8 Am. Fed. Tax Reports, 11274.

The doctrine of complete jurisdiction accepted by the court in the present cases is, it is submitted, predicated on far sounder reasoning than the doctrine of partial jurisdiction enunciated in the cases of *Willard Storage Battery*

Co. v. *Routzahn* and *Electric Storage Battery Co.* v. *McCaughn,* cited above.

Until an action is brought, either against the Collector in the District Court of the United States, or against the United States in the Court of Claims, the taxpayer's claim for the recovery of an illegally assessed tax is inchoate. It only becomes a legally enforcible claim when converted into a judgment either against the Collector personally with a right of enforcement against the United States upon the issue of a Certificate of Probable Cause, or upon a judgment against the United States in the Court of Claims.

When the claims for refund in the present actions were passed upon by the Commissioner, Section 424 had not been adopted.

Assuming, therefore, that in any case of a claimed illegal assessment there must be a determination of the illegality of the assessment by a competent court, it cannot be held, in the absence of language permitting no other construction, that Congress could have intended to take away from the taxpayer his right to the determination by a court of the question of the passing-on of a tax which involves no exercise of discretionary powers. If the sole jurisdiction to determine the question of passing-on is vested in the Commissioner, the taxpayer would be in the anomalous position of being required to try out his action in the court of initial jurisdiction with a possibilty of a review by the appellate court, and then his right of ultimate recovery would be dependent upon the decision of an administrative officer of the Government without a prescribed method of review or appeal which is accorded by law with respect to all other similar decisions of the Commissioner.

In the case of *Boyle Valve Co.* v. *United States, supra,* the court, in discussing this question, says:

"The section provides in subdivision (2) that no refund shall be made unless it is established to the satisfaction of the commissioner that such amount was in excess of the amount properly payable upon the sale of an article subject to tax, or, that the amount was not collected directly or indirectly from the purchaser, or that the amount, although collected from the purchaser, was returned to him. This is merely a requirement that the establishment of the fact required by the statute shall be necessary before any refund can be made. There is nothing discretionary in the commissioner about it. The words 'to the satisfaction of the commissioner' used in the act were inserted to make it clear that Congress intended that strict proof should be required. But this does not prevent a taxpayer upon the rejection of his refund claim from bringing suit to recover the tax alleged to have been erroneously or illegally collected, and, if he can do so, to establish to the satisfaction of the court whether he is entitled to a refund under the terms of the act. The case of *Williamsport Wire Rope Co.* v. *United States*, 277 U. S. 551, 48 Sup. Ct. 587, 72 L. Ed. 985, does not support the claim that section 424 makes the question whether an article sold is an automobile part or an accessory discretionary with the commissioner. The determination whether the tax was collected by the manufacturer directly or indirectly from the purchaser; that is, whether it was added to the purchase price of the article upon the sale of which the tax was imposed, either as a separate item or as a part of the sales price, is an ordinary question of fact; one with respect of which the courts constantly review the commissioner's determination and one that is involved in almost every suit for refund. It is a question of a type requiring no particular skill or knowledge of accountancy, but merely the ability to weigh evidence and to determine when to believe a witness."

There are in addition certain principles of statutory construction which would prevent the acceptance of the claims made by the respondent.

The present actions when tried by the District Court were actions against the Collector, and the judgments were rendered against him individually. When the judgments were rendered, there was no certainty that a Certificate of Probable Cause would issue. If the Certificate of Probable Cause had not issued, the judgments would have been enforceable only against the Collector, and there would have been no occasion for refunds of the tax to the petitioner under the provisions of Section 424.

When the Certificate of Probable Cause is issued, the United States does not refund the tax as such, but the amount recovered in the judgment is required to be paid from the Treasury of the United States. (Section 989, U. S. R. S.)

Obviously, Section 424 does not in terms apply to the present actions, but the respondent's claim on the trial and in the Circuit Court of Appeals was that Section 424 being special legislation must be treated as a modification of and limitation upon the provisions of the Revised Statutes covering actions of this nature, including Section 989.

The petitioner contends that the rule of construction invoked by the respondent is not the proper one to be applied in the present cases. Giving to Section 424 the full effect which the respondent claims, it takes away in its entirety an existing cause of action. Giving to Section 424 the effect only of vesting in the Commissioner exclusive jurisdiction over the issue of the passing-on of the tax, it withdraws from the jurisdiction of the trial court an issue of the existing cause of action, the determination of which in favor of the petitioner is claimed by respondent to be essential to petitioner's right to final recovery.

There are two well established rules of statutory construction which preclude the adoption of the construction claimed by the respondent: first, that taxing statutes are

not to be extended by implication beyond the clear import of the language used,

United States v. *Merriam,* 263 U. S. 179,
Gould v. *Gould,* 245 U. S. 151,

and, second, that a statute will not be construed as withdrawing by implication the existing jurisdiction of the court in the determination of a taxpayer's rights.

In the case of *Cary* v. *Curtis,* 3 Howard 236, 11 L. Ed. 576, the United States Supreme Court held that a statute requiring a collector to turn over all collections for taxes to the Treasury and directing the Treasurer to refund any money paid as taxes in excess of the amount required by law, eliminated the right to sue the collector at common law, which had been recognized by the court in *Elliott* v. *Swartwout,* 10 Peters 137, 9 L. Ed. 373.

In a dissenting opinion in *Cary* v. *Curtis, supra,* which covered in its discussion the subject matter now under consideration, Justice Story said (page 253):

> "The question, stripped of all formalities, is neither more nor less than this: Whether Congress have a right to take from the citizens all right of action in any court to recover back money claimed illegally, and extorted by compulsion, by its officers under color of law, but without any legal authority, and thus to deny them all remedy for an admitted wrong, and to clothe the Secretary of the Treasury with the sole and exclusive authority to withhold or restore that money according to his own notions of justice or right. If Congress may do so in the present case, in the exercise of its power to levy and collect taxes and duties, and thus take away from all courts, state and national, all right to interpret the laws for levying and collecting taxes and duties, and to confide such interpretation to one of its own executive functionaries, whose judgment is to be at once summary and final, then I must say, that it seems to me to be not what I had hitherto supposed it

to be; a government where the three great departments, legislative, executive, and judicial, had independent duties to perform each in its own sphere; but the judicial power, designed by the Constitution to be the final and appellate jurisdiction to interpret our laws, is superseded in its most vital and important functions. I know of no power, indeed, of which a free people ought to be more jealous, than of that of levying taxes and duties; and yet if it is to rest with a mere executive functionary of the government absolutely and finally to decide what taxes and duties are leviable under a particular act, without any power of appeal to any judicial tribunal, it seems to me that we have no security whatsoever for the rights of the citizens. And if Congress possess a constitutional authority to vest such summary and final power of interpretation in an executive functionary, I know no other subject within the reach of legislation which may not be exclusively confided in the same way to an executive functionary; nay, to the executive himself. Can it be true that the American people ever contemplated such a state of things as justifiable or practicable under our Constitution? I cannot bring my mind to believe it; and, therefore, I repeat it, with the most sincere respect for my brethren, who entertain a different opinion, I deny the constitutional authority of Congress to delegate such functions to any executive officer, or to take away all right of action for an admitted wrong and illegal exercise of power in the levy of money from the injured citizens. I am further of opinion, as I shall endeavor presently to show, that Congress never had contemplated passing any such act, and that the act of the 3d of March, 1839, ch. 82, Sec. 2, neither requires nor in my humble judgment justifies such an interpretation."

Justice McLean also dissenting in the same case (page 263) said:

"But there is another aspect in which this case must be considered. Feeling, as I do, an unfeigned respect

for the opinion of the judges who differ from me, yet I cannot, without concern, look at the consequences of the principle established in this case. The right of a citizen to resort to the judicial tribunals of the country, federal or state, for redress for an injury done by a public officer, is taken away by the construction of an act of Congress, which, in my judgment, bears no such construction. But I will take higher ground, and say that Congress have no constitutional power to pass such an act as the statute of 1839 is construed to be by this decision:

"By the 2d section of the 3d article of the Constitution of the United States, the judicial power extends to all cases in law and equity arising under the Constitution and laws of the union. And by the 7th section of the amendments to the Constitution it is provided that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.'

"The act of 1839, in my judgment, does not conflict with either of the above constitutional provisions. But if it take away the right of the citizen to sue in a court of law for the injury complained of, as construed by my brethren, then it is in direct conflict with both of the above provisions.

"In a matter of private right it takes from the judiciary the power of construing the law and vests it in the Secretary of the Treasury, the executive officer under whose sanction or instruction the wrong complained of was done.

"And in the second place it takes from the citizen the right of trial by jury, which is expressly given to him by the Constitution.

"I again repeat that Congress have not done this, nor did they intend to do it by the act of 1839."

The effect of these dissenting opinions is evidenced by the fact that immediately after the rendition of the decision in *Cary* v. *Curtis*, Congress recognized by legislative act a right of action on the part of the taxpayer against a

collector, but this action under the rulings of this Court remained an action at common law.

Sage v. *United States,* 250 U. S. 33, 63 L. Ed. 828.
Smietanka v. *Indiana Steel Co.,* 257 U. S. 1, 66 L. Ed. 99.

In *Graham* v. *Goodcell,* 282 U. S. 409, the Court upheld a provision of the Revenue Act of 1928 which barred the recovery of certain tax over-payments. The decision of the Court was predicated on the right of Congress to deal with a substantive right involved as distinguished from the remedy. Among the claims advanced on behalf of the Government was the claim that the provision of the Act constituted a withdrawal of the right to bring suit as well as withdrawal of the alleged substantive right of the taxpayer. The Court in discussing this claim on page 430 of the opinion said:

> "Having reached this conclusion, it is not necessary to consider the authority of the Congress to withdraw the consent of the United States to be sued. See *United States* v. *Heinszen,* 206 U. S. 391, 51 L. Ed. 1106, 27 S. Ct. 742, 11 Ann. Cas. 688, *supra.* The argument of the government in this respect is not adequate to dispose of the controversy. Some of the present suits were brought against the collector individually and were based upon the right to recover as against him by reason of his illegal acts. Such an action is personal, and not against the United States. *Sage* v. *United States,* 250 U. S. 33, 37, 63 L. Ed. 828, 830, 39 S. Ct. 415; *Smietanka* v. *Indiana Steel Co.,* 257 U. S. 1, 4, 5, 66 L. Ed. 99, 100, 101, 42 S. Ct. 1. If the Congress did not have the authority to deal by a curative statute with the taxpayers' asserted substantive right, in the circumstances described, it could not be concluded that the Congress could accomplish the same result by denying to the taxpayers all remedy both as against the United States and also as against the one who committed the wrong."

Apart from any technical rules of construction, Section 424 is not in its essential characteristics a legislative act entitled to a broad construction. The restrictions which it places upon the right of the taxpayer to recover illegally assessed taxes, outweigh any incidental benefits to subsequent purchasers of the taxable articles.

The Act was enacted subsequent to a series of decisions holding assessments of taxes on alleged accessories by the Commissioner to be illegal. It is limited in its scope to refunds of taxes on parts and accessories, and does not include refunds of taxes on automobiles or trucks where the equities as between the manufacturer and the purchaser are no less entitled to recognition than in the case of parts or accessories.

All taxes paid by a manufacturer, including property taxes, income taxes and excise taxes, are without any essential distinction passed on to the purchaser, but only to the extent that they are absorbed as a cost of production, and can be covered by the sales price.

Costs of all manufactured goods are an aggregate of material costs, labor costs and overhead, including taxes. The selling price of a manufactured article is generally determined by the price which it will bring in a competitive market. Therefore, taxes are passed on to the purchaser to the extent only that the manufacturer receives a price for the article sufficient to absorb in full his costs. A manufacturer first confronted with a new excise tax like the one in question must determine whether the advisable policy will be to attempt to increase the price of the manufactured article by the amount of the tax at the risk of diminishing sales in competition with other manufacturers who may absorb the tax without increase of selling price, or attempt to absorb the tax by maintaining the existing price in anticipation of increased sales resulting from an increase of the sales price by other manufacturers. The

selling price must eventually be determined, however, by the market reaction and not by any arbitrary power of a manufacturer to pass on a tax either directly or indirectly. It follows, therefore, that a manufacturer who increases the price of his goods may, as against a manufacturer who absorbs the tax without increase of price, be the loser on account of diminished sales and the higher production costs resulting therefrom. Such a manufacturer, as against a competitor who did not increase his price, would be penalized by Section 424 through his inability to recover an overpayment in taxes or taxes illegally assessed.

As applied to factual conditions, therefore, Section 424, if construed as preventing or qualifying the enforcement of a common law right of action such as that under consideration, would represent a governmental interference with a taxpayers right to the recovery of an illegally assessed tax, which is not warranted under accepted principles of law, and possibly would go even to the extent of falling within the ruling of *Coolidge* v. *Long*, 282 U. S. 582, that a tax statute may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment to the Constitution.

III.

Findings of Fact and Conclusions of Law of the Circuit Court of Appeals Claimed by the Petitioner to be Erroneous and Without Authority.

The Circuit Court of Appeals overruled certain findings of fact of the district court and conclusions of law thereon, and substituted therefor its own findings of fact and conclusions of law. These facts and conclusions are essential to the determination of the issues before the court, and are covered by petitioner's Assignments of Error in its petition for certiorari. The claim of the petitioner is

that this action of the Circuit Court of Appeals is not justified upon the record and also represents an exercise of judicial authority not vested in the Circuit Court of Appeals.

Discussion of Essential Findings of Fact by the Trial Court Which Were Rejected or Modified by the Circuit Court of Appeals.

The Circuit Court of Appeals in its opinion refers to the use of petitioner's chains on non-taxable vehicles as a "diverted use" and one "to which they are not so well adapted" (R. 259, 260).

These rulings were made despite the findings of equal adaptability by the District Court and the evidence of numerous witnesses that identically the same chains were sold and advertised to the trade for use on taxable and non-taxable vehicles, that the chains purchased by owners of non-taxable vehicles were the same chains as those purchased by the owners of taxable vehicles and were purchased by numbers and sizes and without designation of use, that the chains fulfilled the same functions on non-taxable as on taxable vehicles, and that appropriate sizes of chains could be used interchangeably on taxable and non-taxable vehicles, and in their practical use were so interchanged—none of which evidence was controverted by the respondent. (See summary of evidence, Appendix A.)

The Circuit Court of Appeals made three findings which not only disregarded and overruled general findings of fact by the District Court, but incorrectly asserted the absence of evidence in support of the findings of the District Court.

The opinion of the Circuit Court of Appeals stated (R. 259):

"In the absence of evidence showing that such diverted uses required an article of the same design and primary adaptation as is required for the automobile truck and other motor vehicle uses, the appellee could not succeed."

The court further stated (R. 260):

"The appellee admits that the chains involved were chiefly used and adapted for use on the vehicles referred to as taxable in the statute and seeks its refund on the basis that such chains were applicable for performing certain duties such as furnishing traction only with respect to other vehicles. Such assumption does not mean that the chains were not designed nor primarily adapted for use on automobile trucks or other vehicles referred to in the statute as taxable. To succeed, the appellee should have shown by evidence adaptation for other uses. In the absence of evidence of such a showing, it was erroneous to hold that chains equally adapted for a variety of uses for traction purposes only and commonly put to such uses, one of which is on automobiles, cannot be classified as parts or accessories of such vehicles."

The opinion further stated (R. 260):

"Indeed, there is no evidence that the chains referred to by the court below had the same design or primary adaptation for use on tractors."

The incorrectness of these three statements by the court is proved by reference to the testimony of William A. Palmer (R. 101); Walter J. Kretlow (R. 160); George B. Kutz (R. 164); and William E. Wissler (R. 149), excerpts of the testimony of these witnesses being found in Appendix B.

The opinion of the Circuit Court of Appeals stated (R. 260):

> **"It was incumbent upon the appellee to establish that the Weed chains were not designed or primarily adapted to use on automobile trucks, automobile wagons, other automobiles and motorcycles. This burden required a showing that the specific chains sold and for which the tax was imposed were designed and primarily adapted for some other specific use than that of automobiles."**

The Circuit Court of Appeals is correct in its conclusion that the burden rested upon the petitioner to prove that the chains were not primarily adapted for use on the types of motor vehicles enumerated in the Revenue Acts. To meet this burden, however, did not require proof by the petitioner that the chains were primarily adapted for use on non-taxable types of motor vehicles. This Court applied the rule of equal adaptability, which is the antithesis of primary adaptability. There can be no primary adaptability for any one purpose where there is equal adaptability for two or more purposes. Therefore, the petitioner in establishing the fact, as found by the district court, that the chains were as equally adapted for use on non-taxable as on taxable vehicles, met in this respect its full burden of proof.

The Circuit Court of Appeals in its opinion stated (R. 259):

> **"No effort has been made to show that the tensile strength, twisting strains, or weight of the chains was different from those used and usable on automobile trucks or other automobiles."**

This indicated requirement is exactly contrary to the ruling of the Supreme Court in *Universal Battery Company* v. *United States, supra,* that to take a specific article

out of the taxable classification, there must be an equality of adaptation for uses other than in connection with taxable vehicles. If the chains for use on non-taxable vehicles required a different tensile strength or weight than chains for use on taxable vehicles, petitioner would have had no right of recovery, for that fact would have furnished a means for classification of its chains as between chains adapted for the taxable types of motor vehicles and those adapted for the non-taxable types of motor vehicles. In this reference the Circuit Court of Appeals apparently misunderstood a conclusion reached by the District Court.

On the trial of the case in the District Court, the respondent advanced the claim that proof of equal adaptability of chains for non-taxable vehicles could only be established through proof of identical duty requirements, such as tensile strength, twisting strains and weight. This claim on the part of the respondent went, of course, only to the weight and sufficiency of the petitioner's evidence, and that the claim was given full consideration by the court is indicated by its discussion of this claim in its opinion (R. 25):

> "Again, the defendant argues that the question of adaptability is one which can be established only by proof of duty requirements. As to this claim, it need only be said that the Act, the Regulations, and all the reported cases contain no basis for the contention. And it is well established that the question of mechanical adaptability may be shown by pragmatic evidence that the mechanism in question does in fact function. Here, there is an abundance of testimony that the identical chain used on an automobile functions equally well on a non-taxable vehicle. That the testimony is the product of actual experience as distinguished from mathematical computation does not vitiate its admissibility and, if anything, adds to its weight."

The opinion of the Circuit Court of Appeals stated (R. 258):

> **"The patent rights secured from the United States clearly specify that the chains were adaptable for use on automobiles to prevent skidding. They were described as primarily useful for this purpose. If Congress had intended to give exemption to such an accessory to an automobile, it would have so stated as it did in the case of tractors by reference in the statute, or it would have limited the language of the statute so as to afford clearly an exemption therefor, but it used the words 'parts or accessories.' The use of such generic words intended, we think, that they should be given a broad significance to effectuate the purposes of the statute."**

This conclusion is at variance with the ruling of this Court in the case of *Universal Battery Company* v. *United States, supra,* in two respects:

First. The word "primarily" used in conjunction with "adapted" has two distinctive meanings: One—first in order of time; two—first in rank, which would denote a fitness for a specific use superior to that of its fitness for any other use. Obviously the second meaning is the one with which it is employed by this Court and in the Regulations, because the term "primarily adapted" is used as the antithesis of "equally adapted". This is further evidenced by the fact that Regulations 47, Article 16, uses the word "peculiarly" as the equivalent of "primarily" in the definition of articles excluded from classification as accessories.

> "Articles which have a general commercial use and which are not especially designed and peculiarly adapted for use in connection with automobile trucks, automobile wagons, other automobiles or motorcycles are not subject to tax as 'parts' or 'accessories'."

Also, it is apparent from the standpoint of commercial use that first adaptation in point of time, or even primary adaptation at a time antedating that under consideration, is without relevancy. Electric current was first commercially employed in the telegraph, but today there are hundreds of uses for which it is equally well adapted, although the extent of use differs according to the requirements of each particular use. Pneumatic tires were first employed on horse-drawn vehicles and bicycles, but at the present time they are equally adapted for use in connection with motor driven vehicles. Therefore, the Circuit Court of Appeals in reaching the above stated conclusion has fallen into the error either of according to "primarily" its meaning of first in order of time, or of drawing its conclusion from a commercial status existing at the date of the granting of the patent, entirely different from the commercial status existing during the taxable period.

Second. The conclusion that if Congress had intended to except chains, it would have specified them as it did in the case of tractors, is inconsistent with the ruling of this Court in the case of *Universal Battery Company* v. *United States, supra,* and a number of decisions in the lower courts and departmental rulings, which have held to be non-taxable various articles which in their use have a relationship to the motor vehicles specified in the Revenue Acts similar to chains.

This conclusion of the Circuit Court of Appeals also ignores its own decision in the case of *American La France Fire Engine Company* v. *Riordan,* 6 Fed. (2d) 964, in holding fire engines to be non-taxable, although not specifically exempted in the Act, as were tractors.

The only consistent conclusion from the wording of the Act is that if a legislative intent to tax chains had existed, chains would have been specifically named, as were tires.

The Circuit Court of Appeals Erred and Exceeded Its Authority in Overruling the Findings and Conclusions of the District Court.

There were no special findings of fact and conclusions of law to be reviewed by the Circuit Court of Appeals unless the orders of Judge Hincks (R. 43, 56, 69) make the general findings of fact special findings of fact. If these orders can be given such effect the Circuit Court of Appeals could have reviewed the findings of fact of the District Court only to the extent necessary to determine whether or not they support the judgment of the District Court.

It clearly appears, however, from the opinion of the Circuit Court of Appeals that its conclusions in reversing the District Court were predicated upon a rejection of the findings by the District Court, and the substitution therefor of different findings. This course of procedure deprived the petitioner of its rights to have the determination of the facts made by the trial court which heard the evidence.

The general findings of fact in the opinion of the District Court cannot be construed to be special findings upon the orders entered by Judge Hincks (R. 43, 56, 69), and under Section 700, R. S., in the absence of special findings the general findings of the District Court are conclusive upon all matters of fact and prevent any inquiry into the conclusions of law embodied therein, except the rulings made during the progress of the trial.

Some rulings during the progress of the trial were excepted to and included in the bill of exceptions but were not pressed in the brief or oral argument of the respondent in the Court of Appeals.

The orders made by the District Court on April 29, 1932, were ineffective to create special findings.

In *Fleischmann C. Co.* v. *Forsberg,* 270 U. S. 355, 70 L. Ed. 629, it is said:

> "The opinion of the trial judge, dealing generally with the issues of law and fact and giving his reasons for his conclusions, is not a special finding of facts within the meaning of the statute." (Citing cases.)

In *Java Cocoanut Oil Co.* v. *Pajaro Valley Nat. Bank,* 300 Fed. 305 (9th C. C. A.), the court said:

> "The assumption of the parties that the opinion of the court constitutes a special finding is without foundation, and there is therefore no question before us for review." (Citing cases.) "We have not lost sight of the fact that the opinion is here declared to be the findings of the court, *but such a declaration cannot make of the opinion something which it manifestly is not.*"

One of the leading cases on this point is that of *Rasmusson* v. *Eddy's Steam Bakery, Inc.* (9th C. C. A.), 57 Fed. (2d) 27. After the argument in the Court of Appeals the trial court signed an order *nunc pro tunc* adopting the decision as special findings of fact. The Court of Appeals said:

> "Waiving the jurisdictional question involved, the fact remains that the decision or opinion of the court cannot be treated as special findings in a case at law tried by the court without a jury." (Citing cases.)

Certiorari was denied by this Court on October 10, 1932.

Law v. *United States,* 266 U. S. 494, 69 L. Ed. 401, is authority on the point that the motions for judgment in these cases at the close of the trial did not change the situation and permit the Court of Appeals to review the evidence, as it did, and come to a different conclusion from that of the District Court.

The Findings of Fact.

Petitioner does not concede that the findings of the District Court were special findings, but admitting only for the purposes of argument that they were special findings, the Circuit Court of Appeals was nevertheless limited in reviewing the case "to the determination of the sufficiency of the facts *found* to support the judgment" (Petition 37).

The respondent takes issue with the petitioner on the point as to whether the findings of the District Court were general or special. Petitioner contends that they were general, because they were parts of the opinion, and that the court had no power by its order to make findings that were general into special findings.

Respondent claims that the findings of the District Court were special and for that reason the Court of Appeals had authority to examine the evidence and determine whether that evidence supported the judgment entered by the District Court in favor of the petitioner. Respondent takes this position after the admission found on page 6 of his brief filed in opposition to the petition for certiorari which is as follows:

> "In the instant case the trial judge sitting without a jury in accordance with a written stipulation found all of the facts in respect of the chains involved *necessary to the legal conclusion which he reached.*"

After this admission, respondent, on page 7, says:

> "The findings thus set forth were consequently special findings within the meaning of the statute and the Circuit Court of Appeals under Section 700 *could determine the sufficiency of the evidence to support the judgment.*"

Respondent also states on page 12:

> "There is no substantial doubt that the court had power *to review the evidence.*"

The above quotations (italics ours) show that respondent insists that under Section 700, where the findings are special, the appellate court may consider the evidence introduced on the trial. This is not the import of Section 700 (Petition 37). The part of said section referring to special findings is as follows:

> "And when the finding is special the review may extend to the determination of the sufficiency of the facts *found* to support the judgment."

An appellate court cannot go behind findings of fact of the trial court. There is no authority anywhere, even though the findings are *special,* for an appellate court to consider the sufficiency of the evidence. Its duty is confined to a determination of the sufficiency of the facts *found* to support the judgment. As the respondent has admitted in its brief, as above stated (page 6), that the trial court found "all of the facts in respect of the chains involved necessary to the legal conclusion which he reached," the Court of Appeals had no authority to go behind the findings of the trial court.

In *Mercantile Ins. Co.* v. *Folsom,* 85 U. S. 237, 21 L. Ed. 827, it is said:

> "Propositions of fact found by the court, in a case where the trial by jury is waived, as provided in the act of Congress, are equivalent to a special verdict, and the Supreme Court will not examine the evidence on which the finding is founded, as the act of Congress contemplates that the finding shall be by the circuit court; nor is the circuit court required to make a special finding, as the act provides that the finding of the circuit court may be either general or special, and that it shall have the same effect as the verdict of a jury."
>
> * * * * * * *
>
> "Issues of fact, however, under such a submission, are to be tried and determined by the circuit court, and

it is equally clear that the findings of the circuit court, even when special, cannot be reviewed by the Supreme Court, except for the purpose of determining whether the facts found are sufficient to support the judgment, as the express provision is that the finding of the circuit court in such a case shall have the same effect as the verdict of a jury."

In *Anglo-American, etc., Co.* v. *Lombard* (132 F. 721, 733), Justice Van Devanter, then Circuit Judge, speaking for the Circuit Court of Appeals for the Eighth Circuit, said:

> "In actions at law, where a trial by jury is waived, the duty of finding the facts is placed upon the trial court. We have no authority to examine the evidence for the purpose of finding the ultimate facts, or of correcting or completing a special finding which is imperfect or incomplete." (Citing cases.)
>
> (Certiorari denied, 196 U. S. 638, 49 L. Ed. 630.)

In *Electric Reduction Co.* v. *Lewellyn,* Collector of Internal Revenue (8 Fed. (2d) 91), the District Court for the Western District of Pennsylvania made special findings of fact and gave judgment for the defendant. The Circuit Court of Appeals (11 Fed. (2d) 493) reversed the District Court, but this Court in 275 U. S. 243, 72 L. Ed. 262, sustained the District Court and reversed the Court of Appeals, using the following language:

> "A trial by jury having been waived in writing, our review in this case is limited to the sufficiency of the *facts specially found* to support the judgment, and to the rulings excepted to and presented by the bill of exceptions." (Italics ours.)

In *Ingram-Day Lbr. Co.* v. *McLouth,* 275 U. S. 471, 72 L. Ed. 378, this Court said:

> "Since a jury was waived in writing, appellate review is limited to the sufficiency of the *facts specially*

found to support the judgment and to rulings excepted to and presented by a bill of exceptions." (Italics ours.)

In *U. S.* v. *U. S. F. & G. Co.*, 236 U. S. 527, 59 L. Ed. 703, this Court said:

> "Assuming these defenses were properly pleaded, we still need spend no time upon them, since the argument made here to support them is based not upon the findings, but upon a general review of the evidence and a series of inferences drawn from it that are inconsistent with the facts as found by the trial court. The findings have the same effect as the verdict of a jury, and this court does not revise them, but merely determines whether they support the judgment."

Considering the state of the Record, it makes no difference whether the findings of fact are general or special. If general, there was nothing for the Court of Appeals to consider for there were "no rulings during the progress of the trial" that respondent demanded that the Court of Appeals should reverse, except the ruling on Sec. 424 of the Act of 1928, which the Court of Appeals ignored. If the findings were special, then the sole question was: Are the special findings found sufficient to support the judgment? This they do as is shown by the opinion of the District Court.

Conclusion.

The phraseology of the provisions of the 1921 and 1924 Revenue Acts under consideration, and the necessity for making a determination of the taxability of manufactured articles at the instant of sale by the manufacturer, make impossible any interpretation of those provisions which would permit each individual article of manufacture to be classified according to its ultimate use.

Judged by the standard of ultimate use any devisable general method of classification necessitates subjecting to

taxation individual articles which would otherwise be free from the tax, and the release from taxation of certain individual articles otherwise subject to the tax. The rule of classification approved by this Court in the case of *Universal Battery Company* v. *United States* is a rule which can be applied with accuracy, and is essentially fair to the Government and to the taxpayer.

For the reasons stated in this brief, it is submitted that the decision of the District Court of Connecticut is a fair and logical application of this rule to facts properly found on adequate evidence.

Respectfully submitted,

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APPENDIX "A."

Statement of Evidence Relating to Use of Tire Chains.

(a) *Evidence proving that Weed chains were not especially designed for use on automobiles and trucks.*

Weed Tire Chains were not made especially for tractors, automobiles or trucks (R. 114, 146, 147); that during the taxable period chains were not purchased as designated for tires of tractors or automobiles, but were bought by sizes (R. 121); that Weed Tire Chains used on automobiles and trucks had no peculiar characteristics or design which were not identical to Weed Chains for use on tractors, fire apparatus and road machines, the general design being the same and differing only in weight as the size of the chain increases (R. 130, 137, 156, 76, 142); that there was no tire chain specially made for a tractor, but the chain in existence

at the time of the advent of the tractor was applied to the tractor (R. 134, 153, 167); that there was nothing to prevent the use of the usual car tire chain on a truck or a pneumatic truck tire chain, on a solid tire, or a single or dual, other than the weight of the material used in construction of the chain (R. 137); that Weed Tire Chains made during the taxable period were similar in design and make to those that are manufactured by the company at the present time and would fit the standard make of tires of all automobiles, trucks, and road machines, regardless of their use (R. 74); that they could be detached from automobile and truck tires and used on the same size tires of tractors, fire apparatus or road machines without any change in the chains (R. 77, 142); that there was no difference in the kind of Weed Chains sold in one part of the United States and Canada from what was sold in any other part (R. 78); that Weed Chains were generally used on Walter snow fighters without inquiry being made as to whether they were especially designed for snow fighters and they preformed the identical function as chains on an automobile, when the sizes that would fit the tire of the machines were used (R. 99, 100); that the company did not manufacture a chain especially designed and sold for trucks (R. 146, 147), or for use on fire equipment, or for use on self-propelling motor-driven machines (R. 121, 127, 147); that the chains which the company manufactured and sold for automobiles and trucks were of the same design generally as those which they manufactured and sold for tractors, road maintenance machines, and fire apparatus (R. 125). (The witnesses who testified to the above were residents of Minneapolis, Minnesota; Omaha, Nebraska; Kansas City, Missouri; Des Moines, Iowa; Chicago, Illinois; Atlantic Beach, Long Island; and Evanston, Illinois.)

(*b*) *Weed chains were equally adapted for and during the taxable period were commonly used on tractors, fire appartus, and road machines as well as on automobiles and trucks.*

Weed Tire Chains were used on tractors and trucks; in ordering chains no distinction was made as to whether

they were to be used on trucks or tractors (R. 102, 164); that in storing the chains, they did not keep those for trucks separate from those for tractors (R. 113) and no special barrels or bins were kept for storing chains to fill orders of State highway commissions for fire apparatus or police equipment (R. 161) and orders from State highway commissions for chains were filled out of regular stock as they were if they were orders for private automobiles or trucks (R. 161); that if an order came for a set of dual chains for tractors they would be taken off the same pile as if ordered for the same size truck (R. 114) there being no markings showing which were truck chains and which were tractor chains (R. 114); that Weed tire chains could be used on tractors and road equipment as well as on trucks and automobiles (R. 118); that they were used on Fordson tractors and International and Liberty trucks (R. 132); that they could be used as well on tractors as on automobiles (R. 135); that particular sizes of chains may be used on any type of vehicle having rubber tires, either solid or pneumatic, if the sizes were comparable (R. 140); that a Weed chain of a suitable size could be used just as well on a tractor as on a truck (R. 148, 164, 197, 76, 141); that Weed chains sold for use on fire apparatus, police and road equipment did not differ in any way from the Weed chains sold and used on private automobiles and trucks; that there were no peculiar characteristics about a Weed chain that prevented it from being sold for general use as a commercial commodity and which made it primarily adapted only for use as a component part of a privately owned automobile or truck (R. 149, 150); that Weed chains were used for road maintenance and road equipment and for the fire department of Chicago and other municipalities and for tractors (R. 156); that the difference in Weed chains used on automobiles and those used on fire apparatus was primarily a difference of size (R. 90, 91); that Weed chains were used on Fox rotary snow brooms (R. 95) and Walter snow fighters (R. 98) and a chain of appropriate size that will fit on an automobile or a truck could be used on a fire apparatus or road equipment equally as well (R. 142).

(c) Weed chains were interchangeable and could be used equally as well on tires of automobiles, trucks, tractors, fire apparatus and road machines.

Weed tire chains were interchangeable for use on automobiles and trucks or tractors, if the proper sizes were used, without any change in the chains (R. 102); that chains commonly used on trucks could be used on tractors without any substantial change (R. 105, 127); that in buying chains it was not specified that they were for use on tractors or trucks but they were used interchangeably (R. 113); that a Weed tire chain could be taken off a Pierce Arrow or the Liberty trucks and used on a Fordson tractor (R. 116); that a pair of Weed chains meant for a tractor could be used on a Packard car (R. 123); that a pair of chains used on a fire engine were used on a Ford (R. 104); that chains used on fire apparatus worked just as well on a Locomobile (R. 106, 107), that tire chains may be detached from automobile or truck tires and attached to tires of the same size on tractors, fire apparatus, road equipment vehicles, without any change or adaptation (R. 77, 123, 130, 137, 149, 165, 179, 142); that specific sizes of Weed chains could be placed on tires requiring those sizes and that a 40 x 5 chain could be put on a 38 x 6 tire (R. 132); that the size on a truck and a tractor being the same, the truck chain would come right off the truck onto the tractor (R. 138) and you could interchange them providing the tire sizes are the same; that Weed tire chains were used on fire apparatus, tractors, road maintenance machines such as graders, snow plows, and similar vehicles including road sprinklers (R. 125); that Weed chains used on fire apparatus and road equipment did not differ in any way from Weed chains sold and used on private automobiles and trucks; they were interchangeable (R. 142).

APPENDIX "B."

Excerpts of Evidence of Witnesses Referred to on Page 24 of this Brief.

William A. Palmer, General Foreman of Maintenance, District 9, of the State of Minnesota, testified (R. 101, 102)

that the regular stock Weed chains were used on tractors, and were ordered by sizes. He stated as follows:

> "We made no distinction as to whether they were to be used on trucks or tractors, just used them as we saw fit."

Walter J. Kretlow, a warehouse manager for the appellee, testified (R. 160):

> "I filled orders for the City of Chicago designating delivery at 35th Street, and also on, I think, Loomis Street, out of our regular stock that we sold for automobiles, tractors and trucks, indiscriminately according to size."

George B. Kutz, salesman for the American Chain Company, testified (R. 164):

> "A Weed chain of suitable size can be used as well on a tractor as on a truck. I sold chains that were put to use on tractors. I took orders for chains for the jobbers. I have sold chains for use on tractors, fire apparatus and road equipment used in the construction and maintenance of roads."

and, on page 165, he testified,

> "Weed chains for use on automobiles and trucks have no peculiar characteristics which are not identical with Weed chains for use on tractors, fire apparatus or road equipment. Weed chains may be detached from automobile and truck tires and used on tires of the same size on tractors, fire apparatus or road equipment without any change in the chains. The Weed chains sold by me during the taxable period in my territory for use on fire apparatus, police and road equipment did not differ in any way from the Weed chains sold and used on private automobiles and trucks."

William E. Wissler, engaged in the wholesale automotive business at Des Moines, testified (R. 149):

> "Weed chains for use on automobiles and trucks have no peculiar characteristics which are not identical with Weed chains for use on tractors, fire apparatus, or road equipment. Weed chains may be detached from automobiles or truck tires and used on tires of the same size on tractors, fire apparatus or road equipment without any change in the chains."

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 196

AMERICAN CHAIN COMPANY, INC., PETITIONER

v.

ROBERT O. EATON, COLLECTOR OF INTERNAL REVENUE, DISTRICT OF CONNECTICUT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the District of Connecticut (R. 26–51) is reported in 58 F. (2d) 248.[1] The opinion of the Circuit Court of Appeals for the Second Circuit (R. 391–397) is reported in 63 F. (2d) 783.

[1] A preliminary opinion relating only to the jurisdiction of the District Court (R. 9–15) is reported in 58 F. (2d) 246.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 14, 1933 (R. 397). A petition for a rehearing was denied April 7, 1933 (R. 413). The petition for a writ of certiorari was filed June 22, 1933. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the court below had power to determine the sufficiency of the evidence to support the judgment of the trial court.

2. Whether automobile tire chains are accessories of automobiles within the meaning of Section 900 of the Revenue Act of 1921, and the applicable regulations.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra,* pp. 14–22.

STATEMENT

This suit was brought to recover taxes paid by the petitioner as the manufacturer of tire chains such as are commonly used on the tires of automobiles (R. 27). The respondent collected taxes from petitioner in the aggregate amount of $640,508.43 for the period July 1, 1922, to June 30, 1924, on the ground that the chains made by petitioner were automobile accessories (R. 27).

By stipulation the case was tried by the trial judge without the intervention of a jury (R. 20). At the conclusion of the evidence the trial judge made his order, with written opinion (R. 26–51), from which the following recital of facts is summarized:

When the tax was laid, the petitioner reduced its sale prices to customers by the amount of the tax and so stamped its invoices and bills as to indicate that of the amount charged to the customer 1/21 part was required by the sales tax here in question (R. 28). Thereafter the petitioner computed and paid the tax upon the basis of the price thus reduced. The customer paid the same aggregate amount that he had before. The trial judge concluded that as to the first taxable period (1922) the petitioner had sustained the burden of proving that it had itself borne the tax (R. 28), and that as to the other two taxable periods (1923, 1924) in legal effect the tax was collected from the customers, but since the sales price did not change, it was wholly returned to them (R. 28–29).

The chains made by petitioner were sold by it to jobbers and dealers, and the petitioner did not and could not know how many of the chains thus sold were eventually used or purchased for use on "non-taxable" vehicles (R. 30). The chains generally were advertised by the petitioner for use on vehicles other than automobiles (R. 30). Chains were manufactured in many sizes, varying not

only in the length of the side or rim chain, but also in the length of the cross chain, and heavier wire was used in the construction of the larger sizes (R. 30).

Forty-nine sizes of chains, which were designated as to size and amount of tax paid in respect thereof (listed in Schedule "A" annexed to the opinion (R. 51–56)), fitted at least one type of vehicle other than an automobile equally as well as any automobile, and they operated as effectively upon the one class of vehicles as upon the other (R. 30). Wholly without adaptation for the purpose these chains were interchangeable upon such vehicles of both classes as used tires of substantially the same size (R. 30). There was no differentiation, either of construction or of design, in the chains used on the tires of "non-taxable vehicles" from those used on tires of "taxable vehicles" (R. 30). In ordering chains the universal practice was to order by size only, without specifying what kind of vehicle the chain was intended for (R. 30–31).

The mechanical design of petitioner's chains was embodied in patents issued as early as 1904 (R. 31). Chains were in use for automobiles and trucks before the internal combustion tractor came upon the market (R. 31). The number of "taxable vehicles" during the taxable years exceeded the number of "non-taxable motor vehicles" (R. 31).

The trial judge concluded that the sizes listed in Schedule "A" were actually used on "non-taxable vehicles," and that all chains except those listed in such schedule "A" were designed and primarily adapted to use on taxable vehicles, "there being no evidence that they had any other use during such periods" (R. 32).[2] To the extent of the 49 sizes, a judgment for the petitioner was entered (R. 32–33, 51).

On appeal, the Circuit Court of Appeals for the Second Circuit reversed the judgment of the District Court (R. 397).

ARGUMENT

I.

THE CIRCUIT COURT OF APPEALS HAD AUTHORITY TO DETERMINE WHETHER THE JUDGMENT OF THE TRIAL COURT WAS SUFFICIENTLY SUPPORTED BY THE FACTS

The petitioner, relying on Sections 649 and 700 of the Revised Statutes (*infra,* p. 14), contends that the Circuit Court of Appeals erred in overruling the findings and conclusions of the District Court (Br. 15).

Section 649 provides that issues of fact in civil cases may be tried without a jury, and that the finding of the court upon the facts, which may be either general or special, shall have the same effect as the

[2] The record contains much testimony introduced by the petitioner at the trial, directed to proof of use of chains on snow-plows, tractors, fire apparatus, etc. (R. 123–346).

verdict of a jury. Section 700 provides, in part, that when such finding is special, the review by the appellate court may extend to the determination of the sufficiency of the facts found to support the judgment.

In the instant case the trial judge sitting without a jury in accordance with a written stipulation (R. 20) found all of the facts in respect of the chains involved necessary to the legal conclusion which he reached (R. 29–31). These findings were segregated to that part of the opinion (R. 29–42) dealing with Section 900 of the Revenue Act of 1921; and directly following such findings the trial judge stated his reasoning and his legal conclusions on that branch of the case. Later at the same term[3] and before any appeal to the Circuit Court of Appeals, the District Judge made an order constituting the findings of fact and conclusions of law set forth in his opinion, special findings of fact, and conclusions of law (R. 68). Thus the record was such when the case was before the Circuit Court of Appeals as to allow that court to pass on the sufficiency of the evidence under Section 700 of the Revised Statutes, and the court did so.

The petitioner characterizes the findings as "general" (Pet. 9, 37) without citation of au-

[3] See rule 20 of the Rules of the District Court for the District of Connecticut.

thority, and argues (Pet. 16–21) that the order of the District Judge could not make his findings of fact special.

We contend that the findings as made and stated are sufficiently explicit to constitute special findings, and if their technical designation as such was necessary, the District Judge could, as he did, correct the records of his own court within the term and before an appeal. *Insurance Co.* v. *Boon,* 95 U.S. 117, 125–128; *So. Utah Mines* v. *Beaver County,* 262 U.S. 325, 329–330.

In making his findings the District Judge used the expression "I find" (R. 30), and having stated what his findings of facts were, he then designedly stated his opinion as apart from the facts (R. 31). But if the findings as stated in the trial court's decision failed in any particular as to technical form, that was corrected by the order entered by the trial judge during the term. The findings thus set forth were consequently special findings within the meaning of the statute, and the Circuit Court of Appeals, under Section 700, could determine the sufficiency of the evidence to support the judgment.

The cases cited by petitioner do not hold otherwise. In *Fleischmann Co.* v. *United States,* 270 U.S. 349, the question was as to the sufficiency of a bill of exceptions authorized *nunc pro tunc* by the

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trial court *after* jurisdiction had been transferred to the Circuit Court of Appeals (p. 357).

In *Rasmusson* v. *Eddy's Steam Bakery*, 57 F. (2d) 27 (C.C.A. 9th), certiorari denied, 287 U.S. 601, as is disclosed by the language of the brief of the Solicitor General relied upon by the petitioner (Br. 18), *after* the appeal was taken from the District Court, thus transferring jurisdiction, the District Court made an order adopting the opinion as its special findings of fact. Obviously this did not enlarge the scope of review to include matters not before the reviewing court, because such matters were not raised in the trial court at the proper time, or while the case was still before the trial court.

British Queen Mining Co. v. *Baker Silver Mining Co.*, 139 U.S. 222, merely holds on the record there that the "special findings" could not be treated as enabling the reviewing court to determine whether the facts found supported the judgment, because the general findings made could not be disregarded.

Harvey Co. v. *Malley*, 288 U.S. 415, turned on the failure of the plaintiff seeking review in the Circuit Court of Appeals to secure, by exception taken during the trial and properly presented by bill of exceptions, rulings on questions of law made by the trial judge. This was, of course, controlled

by the first clause of Section 700 (*infra*, p. 14), dealing with general findings.

II

THE PETITIONER'S CHAINS WERE PROPERLY TAXED AS ACCESSORIES UNDER SECTION 900 OF THE REVENUE ACT OF 1921

On the merits, the issue in this case is whether the tire chains made and sold by the petitioner were "accessories" of an automobile, as that word was used in Section 900 of the Revenue Act of 1921, and Section 600 of the Revenue Act of 1924, *infra*, pp. 14–15.

Article 16 of Regulations 47 (*infra*, pp. 19–20) defines an "accessory" as

> * * * any article *designed* to be attached to or used in connection with such vehicle to add to its utility or ornamentation and which is *primarily adapted* for use in connection with such vehicle, whether or not essential to its operation. (Italics ours.)

And see Article 15 of Regulations 47 (*infra*, pp. 18–19).

In *Universal Battery Co.* v. *United States*, 281 U.S. 580, 583–584, this Court said of these Regulations:

> The regulations also have construed the term "accessory" as meaning any article designed to be used in connection with such vehicle

> to add to its utility or ornamentation and which is primarily adapted for such use, whether or not essential to the operation of the vehicle.
>
> This construction of those terms has been adhered to in the Internal Revenue Bureau for about ten years and it ought not to be disturbed now unless it be plainly wrong. We think it is not so, but is an admissible construction. * * *. We think the view taken in the administrative regulations is reasonable and should be upheld. It is that articles primarily adapted for use in motor vehicles are to be regarded as parts or accessories of such vehicles, even though there has been some other use of the articles for which they are not so well adapted.

The court below said that petitioner's chains were "designed and primarily adapted for automobile use"; that the patent rights secured from the United States specify the adaptability of the chains for automobile use, and that the chains "were described as primarily useful for this purpose" (R. 393). It then said (R. 394):

> It cannot be seriously doubted that the Weed chains * * * were designed and primarily adapted for use in automobile trucks, wagons, other automobiles, and motorcycles. * * *.

It thus appears that the decision below may be adequately rested on the ground that the petitioner's

chains were designed and primarily adapted for automobile use. This conclusion, we submit, is amply supported by the evidence.

The court below also said (R. 395):

> It was concluded below that the primary adaptation rule, referred to in *Universal Battery Co.* v. *United States, supra,* has no application to cases where the appellee, by evidence of subsequent untaxed resales, shows two uses, one of which is the admitted principal use on automobiles and the other is a possible exempted use even though it be a diverted use. *We think such a conclusion ignores the chief or principal use as being determinative of the primary adaptation rule, referred to by the Supreme Court,* and it also assumes evidence of untaxed resales for possible diverted uses, sufficient to override the primary adaptation rule. (Italics ours.)

This language suggests a different test as determinative of primary adaptation, namely, that of chief or principal use. If it be considered that the opinion below rests on that ground, then the decision appears to be in conflict with *McCaughn* v. *Electric Storage Battery Co.*, 63 F. (2d) 715 (C.C.A. 3d), and with *Routzahn* v. *Willard Storage Battery Co.*, 65 F. (2d) 89 (C.C.A. 6th), in the latter of which the Government intends to file a petition for a writ of certiorari.

If this Court should conclude to grant the present petition, the respondent will also rely on Section 424 of the Revenue Act of 1928. (*infra*, pp. 16–17) as a defense. This provision forbids the making of any refund of tax in cases of this sort unless—

> It is established to the satisfaction of the Commissioner * * * that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him; * * *

This defense was raised in the District Court and there decided against the Government. The question was again raised in the Circuit Court of Appeals but was not passed upon there because that court concluded that the petitioner had no cause of action in any event.

This question was decided against the contentions of the Government in *Jefferson Electric Mfg. Co.* v. *United States*, 38 F. (2d) 139 (C.Cls.), in which case, following a judgment on the merits for the taxpayer, the Government has filed a petition for a writ of certiorari which is now pending before this Court, No. 171, October Term, 1933.

CONCLUSION

We believe that this case has been correctly decided on the merits. There is no substantial doubt that the court had power to review the evidence.

Nor is the jurisdictional question important in this particular case if the taxpayer cannot succeed on the merits.

Respectfully submitted.

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Solicitor General.

PAT MALLOY,
Assistant Attorney General.

SEWALL KEY,
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ERWIN N. GRISWOLD,
Attorney.

JULY 1933.

APPENDIX

Revised Statutes:

SEC. 649. Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury (U.S.C., Title 28, Sec. 773).

SEC. 700. When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment (U.S.C., Title 28, Sec. 875).

Revenue Act of 1921, c. 136, 42 Stat. 227, 291:

SEC. 900. That from and after January 1, 1922, there shall be levied, assessed, collected, and paid upon the following articles sold

or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—

(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;

(2) Other automobiles and motorcycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;

(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum;

* * * * *

Revenue Act of 1924, c. 234, 43 Stat. 253, 322:

SEC. 600. On and after the expiration of thirty days after the enactment of this Act there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentage of the price for which so sold or leased—

(1) Automobile truck chassis and automobile wagon chassis sold or leased for an amount in excess of $1,000, and automobile truck bodies and automobile wagon bodies

sold or leased for an amount in excess of $200 (including in both cases tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the sale thereof), 3 per centum. * * *;

(2) Other automobile chassis and bodies and motor cycles (including tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum. * * *;

(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 2½ per centum. * * *;

* * * * *

(U.S.C., Title 26, Sec. 881.)

Revenue Act of 1928, c. 852, 45 Stat. 791, 866:

SEC. 424. REFUND OF AUTOMOBILE ACCESSORIES TAX

(a) No refund shall be made of any amount paid by or collected from any manufacturer, producer, or importer in respect of the tax imposed by subdivision (3) of section 600 of the Revenue Act of 1924, or subdivision (3) of section 900 of the Revenue Act of 1921 or of the Revenue Act of 1918, unless either—

(1) Pursuant to a judgment of a court in an action duly begun prior to April 30, 1928; or

(2) It is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of an article subject to tax, or that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him; or

(3) The Commissioner certifies to the proper disbursing officer that such manufacturer, producer, or importer has filed with the Commissioner, under regulations prescribed by the Commissioner with the approval of the Secretary, a bond in such sum and with such sureties as the Commissioner deems necessary, conditioned upon the immediate repayment to the United States of such portion of the amount refunded as is not distributed by such manufacturer, producer, or importer, within six months after the date of the payment of the refund, to the persons who purchased for purposes of consumption (whether from such manufacturer, producer, importer, or from any other person) the articles in respect of which the refund is made, as evidenced by the affidavits (in such form and containing such statements as the Commissioner may prescribe) of such purchasers, and that such bond, in the case of a claim allowed after February 28, 1927, was filed before the allowance of the claim by the Commissioner.

* * * * *

Treasury Regulations 47, Revised December, 1921:

ART. 14. *Tires, inner tubes, parts, and accessories sold to manufacturers.*—The words "tires, inner tubes, parts, or accessories" shall be understood to embrace only such tires, inner tubes, parts, or accessories as have reached such a stage of manufacture that they constitute articles commonly or commercially known as "tires, inner tubes, parts, or accessories," and shall not be understood to embrace raw materials used in the manufacture of such articles.

* * * * *

Any article which has reached a state of manufacture wherein it is in itself a component part or accessory, and is of such a nature that it may be used or attached by an ordinary repair man or individual user as distinguished from a manufacturer or producer, is subject to tax as a "part or accessory."

* * * * *

ART. 15. *Definition of parts.*—A "part" for an automobile truck, automobile wagon, other automobile, or motor cycle is any article designed or manufactured for the special purpose of being used as or to replace a component part of any such vehicle and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use

and which is primarily adapted only for use as a component part of such vehicle.

* * * * *

Mere stock or commercial commodities, such as bolts, nuts, washers, screws, etc., though used as components for such vehicles, are not "parts" within the meaning of subdivision (3). Articles, however, which ordinarily would be classed as commercial commodities become parts when, because of their design or construction, they are primarily adapted for use as component parts of such vehicles.

* * * * *

ART. 16. *Definition of accessories.*—An "accessory" for an automobile truck, automobile wagon, other automobile, or motorcycle is any article designed to be attached to or used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for use in connection with such vehicle, whether or not essential to its operation.

* * * * *

Articles which have a general commercial use and which are not especially designed and peculiarly adapted for use in connection with automobile trucks, automobile wagons, other automobiles, or motorcycles are not subject to tax as "parts" or "accessories." * * *.

If any doubt exists as to the special adaptability of any article, the fact of its

sale by the manufacturer to be used with an automobile, or to an automobile accessories dealer, would determine its taxability.

* * * * *

Treasury Regulations 47, Revised August 1924:

ART. 15. *Tires, inner tubes, parts and accessories sold to manufacturers.*—The tax of 2½ per cent applies to *all* tires, inner tubes, parts, or accessories sold separately by the manufacturer thereof, unless the sale is made to a manufacturer who furnishes a certificate in the form provided in this article for the exemption of such sale. * * *.

The words "tires, inner tubes, parts, or accessories" shall be understood to embrace only such tires, inner tubes, parts, or accessories as have reached such a stage of manufacture that they constitute articles commonly or commercially known as "tires, inner tubes, parts, or accessories," and shall not be understood to embrace raw materials used in the manufacture of such articles.

* * * * *

ART. 16. *Parts or accessories—Definition of parts.*—A "part" for an automobile truck, automobile wagon, or other automobile chasis or body, or motorcycle, is any article designed or manufactured for the special purpose of being used as, or to improve, repair, or replace, a component part of any

such vehicle, or article, and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use, or which is primarily adapted only for use as a component part of such vehicle or article.

Definition of accessories.—An "accessory" for an automobile truck, automobile wagon, or other automobile chassis or body, or motorcycle, is any article designed to be attached to or used in connection with such vehicle or article to add to its utility or ornamentation, or any article which is primarily adapted for use in connection with such vehicle or article whether or not essential to its operation or use.

* * * * *

Articles which have a general commercial use and which are not especially designed or peculiarily adapted for use in connection with automobile truck, automobile wagon, or other automobile chassis or bodies, or motorcycles, are not subject to tax as "parts or accessories." * * *.

Mere stock or commercial commodities such as bolts, nuts, washers, screws, etc., though used as components for taxable articles, are not "parts" within the meaning of subdivision (3) when sold separately. Articles, however, which ordinarily would be classed as commercial commodities become parts when, because of their design or con-

struction, they are primarily adapted for use as component parts of such vehicles.

* * * * *

Parts or accessories for automobile trucks automobile wagons, other automobiles, or motorcycles, primarily adapted for use on or in connection therewith are taxable when sold by the manufacturer thereof regardless of the purpose for which used.

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 196

AMERICAN CHAIN COMPANY, INC., PETITIONER

v.

ROBERT O. EATON, COLLECTOR OF INTERNAL REVENUE, District of Connecticut

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the United States District Court for the District of Connecticut (R. 16–32) is reported in 58 F. (2d) 248.[1] The opinion of the Circuit Court of Appeals for the Second Circuit (R. 255–261) is reported in 63 F. (2d) 783.

[1] A preliminary opinion relating only to the jurisdiction of the District Court (R. 6–10) is reported in 58 F. (2d) 246.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 14, 1933 (R. 261–262). A petition for a rehearing was denied April 7, 1933 (R. 262). The petition for a writ of certiorari was filed June 22, 1933 (R. 263), and was granted October 9, 1933 (R. 262–263). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Does Section 424 of the Revenue Act of 1928 require as a prerequisite to a suit for the recovery of automobile excise taxes that the Commissioner of Internal Revenue shall first determine that the manufacturer has himself borne the burden of the tax?

2. Are tire chains parts or accessories of automobiles within the meaning of Section 900 of the Revenue Act of 1921 and the applicable Regulations?

3. Did the court below have power to determine the sufficiency of the evidence to support the judgment of the trial court?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set out in the Appendix, *infra*, pp. 23–29.

STATEMENT

This suit was brought to recover taxes paid by the petitioner as the manufacturer of tire chains such as are commonly used on the tires of automobiles. The respondent collected taxes from the peti-

tioner in the aggregate amount of $640,508.43 for the period July 1, 1922, to June 30, 1924, on the ground that the chains made by the petitioner were automobile accessories (R. 16).

By stipulation the case was tried by the court without a jury (R. 12, 51, 63). At the conclusion of the evidence the trial judge made his order, with written opinion (R. 16–32), from which the following recital of facts is summarized:

When the tax was laid, the petitioner reduced its sale price to customers by the amount of the tax and so stamped its invoices and bills as to indicate that of the amount charged to the customer 1/21 part was required by the sales tax here in question (R. 17). Thereafter the petitioner computed and paid the tax upon the basis of the price thus reduced. The customer paid the same aggregate amount that he had before. The trial judge concluded that as to the first taxable period (1922) the petitioner had sustained the burden of proving that it had itself borne the tax (R. 17), and that as to the other two taxable periods (1923 and 1924) in legal effect the tax was collected from the customers, but since the sales price did not change, it was wholly returned to them (R. 17–18).

The chains made by the petitioner were sold by it to jobbers and dealers, and the petitioner did not and could not know how many of the chains thus sold were eventually used or purchased for use on "non-taxable" vehicles (R. 18). The chains generally were advertised by the petitioner for use on

vehicles other than automobiles (R. 18). Chains were manufactured in many sizes, varying not only in the length of the side or rim chain, but also in the length of the cross chain, and heavier wire was used in the construction of the larger sizes (R. 18).

Forty-nine sizes of chains, which were designated as to size and amount of tax paid in respect thereof (listed in Schedule "A" annexed to the opinion (R. 32–36)), fitted at least one type of vehicle other than an automobile equally as well as any automobile, and they operated as effectively upon the one class of vehicle as upon the other (R. 19). Wholly without adaptation for the purpose these chains were interchangeable upon such vehicles of both classes as used tires of substantially the same size (R. 19). There was no differentiation, either of construction or of design, in the chains used on the tires of "non-taxable vehicles" from those used on tires of "taxable vehicles" (R. 19). In ordering chains the universal practice was to order by size only, without specifying what kind of vehicle the chain was intended for (R. 19).

The mechanical design of the petitioner's chains was embodied in patents issued as early as 1904 (R. 19). Chains were in use for automobiles and trucks before the internal combustion tractor came upon the market (R. 19). The number of "taxable vehicles" during the taxable years exceeded the number of "non-taxable motor vehicles" (R. 19).

The trial judge concluded that the sizes listed in Schedule "A" (mentioned above) were actually used on "non-taxable vehicles,"[2] and that all chains except those listed in such schedule "A" were designed and primarily adapted for use on taxable vehicles, "there being no evidence that they had any other use during such period" (R. 20). To the extent of the 49 sizes, a judgment for the petitioner was entered (R. 41, 54, 67).

On appeal, the Circuit Court of Appeals for the Second Circuit reversed the judgment of the District Court (R. 261).

SUMMARY OF ARGUMENT

I

Regardless of the applicability of Section 900 of the Revenue Act of 1921 (*infra*, p. 23), taxing automobile parts and accessories, Section 424 of the Revenue Act of 1928 (*infra*, p. 25) precludes recovery by this petitioner. That section forbids any refund unless it is established *to the satisfaction of the Commissioner of Internal Revenue* that the amount sought was not collected directly or indirectly from customers. We contend that this gave exclusive jurisdiction to the Commissioner to decide who bore the burden of the tax.

But if this Court should hold otherwise, the decision below must nevertheless be affirmed because

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[2] The record contains much testimony introduced by the petitioner at the trial directed to proof of use of chains on snowplows, tractors, fire apparatus, etc. (R. 72–227).

the trial court's finding that the petitioner bore the burden of the tax is wholly inconsistent with the fact that invoices and bills to customers stated that 20/21 of the gross amount represented the sale price of the article and 1/21 of that amount represented the excise tax. That being so, the finding that the petitioner bore the tax or returned it to its customers is entirely unsupported.

There is no merit in the taxpayer's contention that Section 424 of the Revenue Act of 1928 is unconstitutional. It deprives the taxpayer of nothing to which it is beneficially entitled.

II

The statute is applicable to parts and accessories chiefly or principally used in connection with automobiles. The question of the proper construction of Section 900 of the Revenue Act of 1921 and Section 600 of the Revenue Act of 1924 (*infra*, pp. 23–24) is discussed in the Government's brief in *Routzahn* v. *Willard Storage Battery Co.*, No. 329, October Term, 1933, and that argument need not be repeated here. It may be summarized in the contention that neither the statute which taxed "parts or accessories," nor the regulations under that statute, were intended to require that the article be exclusively adapted for use on automobiles. The judgment of the District Court in this case, being based solely on the ground that the tire chains in question were "equally adapted" for use on non-

taxable vehicles, without giving any weight whatever to the chief use of the tire chains, was erroneous and was properly reversed by the court below.

III

The Circuit Court of Appeals had authority to review the judgment of the District Court. Whether the findings of the trial court be regarded as general or special, there still remained open for review the rulings made during the progress of the trial. There were several such rulings in this case which duly appear in the bill of exceptions. In particular, at the close of all the evidence, the respondent made a motion for judgment. The question whether the judgment was supported by any evidence was, therefore, open for review in the Circuit Court of Appeals. *Maryland Casualty Co.* v. *Jones,* 279 U.S. 792, 795. There were also numerous rulings on the admission and exclusion of evidence to which exceptions were taken. These rulings, appearing in the bill of exceptions, formed a proper basis for review in the court below.

ARGUMENT

I

SECTION 424 OF THE REVENUE ACT OF 1928 REQUIRES THAT, AS PRELIMINARY TO RECOVERY OF A TAX, A CLAIMANT ESTABLISH TO THE SATISFACTION OF THE COMMISSIONER OF INTERNAL REVENUE THAT THE TAX WAS ACTUALLY BORNE BY THE CLAIMANT

Regardless of the applicability of Section 900 of the Revenue Act of 1921 (*infra,* p. 23), Section 424 of the Revenue Act of 1928 (*infra,* p. 25) precludes

recovery by this petitioner. The court below did not consider whether Section 424 was thus controlling because of the view that it took of the applicability of Section 900.

Section 424 (a) (2) of the 1928 Act forbids the refund of automobile parts or accessories tax to a manufacturer unless—

> *It is established to the satisfaction of the Commissioner* that such amount * * * was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him; * * *.[3] (Italics ours.)

We contend that by Section 424 (a) (2) the Commissioner is given exclusive jurisdiction to decide who paid the tax. Our position on this issue is discussed in the brief for the Government in *United States* v. *Jefferson Electric Mfg. Company*, now pending in this Court, No. 171, October Term, 1933, and we need not repeat the argument there made. The question is also before this Court in *Routzahn* v. *Willard Storage Battery Company*, No. 329, October Term, 1933, where the Circuit Court of Appeals for the Sixth Circuit held in effect that de-

[3] Section 424 prescribes three other situations in which such refunds may be made: (1) if pursuant to a judgment of a court in a suit instituted prior to April 30, 1928; (2) if the amount is an overpayment of tax on an article properly taxable; or (3) if the manufacturer has filed a bond to repay such portion of the refund as is not distributed to the purchasers of the articles.

termination by the Commissioner could follow a court decision as to the validity of the tax.

Even if the Commissioner's decision is not conclusive, we contend that the petitioner has not made the showing required by the statute. In its complaint in the District Court the petitioner alleged that the tax was not paid directly or indirectly by the purchaser of its chains; that the chains were sold to customers at a flat price with no amount for excise tax included; and that the petitioner did not increase the price of chains by the amount of the tax but itself absorbed the tax (R. 3).

The respondent moved to dismiss the complaint, relying upon Section 424 (R. 5–6). The District Court denied the motion in a memorandum decision (R. 6–10).

When the case had been tried on the merits the court found that as to the first taxable period the petitioner had sustained the burden of proof; with respect to the two other taxable periods involved it found that the petitioner had (R. 17–18)—

> reduced its sale prices by the amount of the tax and so stamped its invoices and bills as to indicate that of the amount charged to the customer 1/21 part was required by the sales tax in question.[4] Thereafter the plaintiff computed and paid the excise tax upon the

---

[4] The fact is similar in the *Jefferson Electric* case, No. 171, *supra*.

> basis of the price thus reduced, thereby saving to itself the payment of a tax upon a tax—5 per cent on 5 per cent. The arrangement cost the customer nothing, as he paid in the aggregate just what he had paid before. Consequently the plaintiff did not thereby pass the economic burden of the tax to its purchasers. However, since under this arrangement the invoices indicated the 1/21 of the amount billed was for the tax, I am constrained to conclude that the balance, 20/21, was the *real sale price,* especially since the tax was thereafter paid on that basis. This requires the conclusion of fact that in legal effect the tax was collected from the purchaser. But in view of the fact that the sales prices in vogue prior to the inauguration of this arrangement were thereafter reduced by the amount of the tax, I find further that in so far as the tax was collected from purchasers, it was wholly returned to them. (Italics ours.)

Thus, by the petitioner's own statement on the invoices and bills and by the finding of the District Court, 20/21 of the purchase price was the "real sale price," especially since the tax was paid on that basis (R. 18). Furthermore, by taking 20/21 of the old price as the base for the excise tax the petitioner saved 5% of the tax, as is pointed out by the District Court.

Although it found these facts, the District Court concluded that "in legal effect" the tax was col-

lected from the purchaser, and that "in so far as the tax was collected from purchasers, it was wholly returned to them" (R. 18). This is apparently the whole basis of the trial court's conclusion that the tax was paid by the petitioner. We contend that it is plainly wrong.

The fact that sales prices in vogue prior to the inauguration of the arrangement described above did not change is certainly not enough. Competition within the industry with consequent falling of sales prices, decrease in manufacturing costs, or any one of many incidents of business, might induce or cause the manufacturer to keep the price paid by his customers for his product on a certain level. The fact that the price paid did not change might be evidence as to who bore the tax. But it is certainly not sufficient to overcome the other fact found here, namely, that the "real sale price" was 20/21 of what had formerly been the sale price, and 1/21, *which the customer was paying,* was on account of the tax.

We submit, therefore, that even if this Court shall hold that we are wrong in our primary contention that Section 424 confers exclusive jurisdiction of this fact question upon the Commissioner of Internal Revenue, nevertheless the finding in this case that the tax was returned to the customers is so unwarranted that the decision below should be affirmed by this Court.

The petitioner argues that if Section 424 be construed as a bar to the present suits, it contravenes the Fifth Amendment to the Constitution because the date specified in the section, April 30, 1928, is prior to the date of the enactment of the Revenue Act of 1928. But the petitioner overlooks the fact that Section 424 did not adversely affect its ability to secure the refunds, since at the time of the enactment of Section 424 its right to the refund had already been limited by the Act of February 28, 1927, c. 226, 44 Stat. 1250, 1254, and succeeding statutes embodying the same provisions. See p. 9 of the Government's brief in *United States* v. *Jefferson Electric Mfg. Co.*, No. 171, October Term, 1933. The date specified in Section 424—April 30, 1928—was therefore more than a year after the petitioner's right was first affected and plainly allowed the petitioner and other taxpayers a reasonable time for the bringing of suits after the enactment of the Act of February 28, 1927, *supra*. Moreover, the petitioner is in no position to complain that Section 424 barred suits from a date prior to its enactment, for all of the petitioner's suits were brought more than a year after the enactment of the Revenue Act of 1928 (R. 5, 48, 61).

If the petitioner's argument is an attack upon the constitutionality of the Act of February 28, 1927, *supra*, and the statutes succeeding it, the argument is, we submit, without merit. Those Acts were appropriation acts, and forbade the use of public money for refunds of taxes on automobile

parts and accessories, except upon the conditions therein prescribed. We are aware of no limitation upon the power of Congress to refuse to appropriate money. See *Reeside* v. *Walker*, 11 Howard 271, 291; Article I, Section 9, of the Constitution.

If the petitioner's attack is directed against the curtailment of the substantive right to the refunds, we think there was ample justification for the action of the Congress. As shown by the report of the Committee on Ways and Means with respect to Section 424 of the 1928 Act, Congress believed that in many cases refunds of taxes paid on automobile parts and accessories would unjustly enrich manufacturers who had not borne the burden of the taxes. House Report No. 2, 70th Congress, 1st Session, p. 27; printed at pp. 29–30 of the Government's brief in *United States* v. *Jefferson Electric Mfg. Co.*, No. 171, October Term, 1933. If a manufacturer had not borne the burden of the tax but had collected it directly from the consumer, then the manufacturer, if he obtained a refund, would be liable to the consumer in an action based on quasi-contract. Such actions, however, would rarely be brought, both because the individual consumers would rarely know the facts and because the amount due to each individual purchaser would rarely be enough to warrant a suit—although the amounts in the aggregate, as the cases now pending show, would be very large. The effect of the statute, therefore, was to deprive the taxpayer of its *legal* right to a refund if the taxpayer was not in fact

and in law *beneficially* entitled to it. Congress provided in substance that a refund should not be made if it would in effect be a windfall to the taxpayer.

Such a statute, we submit, was within the constitutional competence of Congress. It took away from the taxpayer nothing to which it was beneficially entitled. Congress may take away an existing right of a taxpayer to a refund in order to prevent an unjust and inequitable administration of the law, and this is true whether the suit is in form against the collector personally or is against the United States. *Graham & Foster* v. *Goodcell,* 282 U.S. 409.

II

THE STATUTE IS APPLICABLE TO PARTS AND ACCESSORIES CHIEFLY OR PRINCIPALLY USED IN CONNECTION WITH AUTOMOBILES

The District Court found from the "subordinate facts" that certain chains made by the petitioner "were not primarily adapted for use on taxable vehicles, but were equally adapted for use on non-taxable vehicles" (R. 19). The Circuit Court of Appeals held that this conclusion was based on an erroneous view of the law. It said (R. 259):

> We think such a conclusion ignores the chief or principal use as being determinative of the primary adaptation rule, referred to by the Supreme Court, and it also assumes evidence of untaxed resales for possible diverted uses, [is] sufficient to override the primary adaptation rule.

We submit that the court below correctly held that the chief or principal use should be determinative of the application of Section 900 of the Revenue Act of 1921 and Section 600 of the Revenue Act of 1924 (*infra*, pp. 23–24) which imposed a tax on "parts or accessories" of automobiles.

This question is discussed in the Government's brief in *Routzahn* v. *Willard Storage Battery Co.*, No. 329, October Term, 1933, and that argument need not be repeated here. It may be summarized in the contention that neither the statute which taxed "parts or accessories," nor the regulations under that statute, were intended to require that the article be "exclusively adapted" for use on automobiles. The judgment of the District Court in this case, being based solely on the ground that the tire chains in question were "equally adapted" for use on nontaxable vehicles, without giving any weight whatever to the chief use of the tire chains, was erroneous and was properly reversed by the court below.

The record in this case contains a considerable volume of testimony showing the use of the petitioner's chains on tractors (R. 76, 105, 111, 113, 117, 135, 141), fire apparatus (R. 77, 86, 89–90, 141, 156), road machines (R. 77 101, 117, 141, 156), and snow machinery (R. 94–95, 97–98), and showing their interchangeability between various machines (R. 77–78, 123, 127–128, 130). But there was no evidence and no finding to show that such uses were more than incidental and occasional and repre-

sented more than a small part of the volume of the petitioner's sales. One witness for the petitioner testified that five to ten percent of the chains were used on vehicles other than automobiles (R. 151). There was testimony that the percentage of chains for tractor use was small, and that many more chains were in use on automobiles than on tractors (R. 162, 182, 192, 196). The use on fire apparatus was limited (R. 190). There was also evidence to show that chains were used on automobiles before they were used on tractors (R. 153, 164, 186).

If the chief use of an article is the proper factor in determining its primary adaptability, the evidence was plainly insufficient to support the District Court's judgment in favor of the taxpayer.

Apart from the evidence as to the chief use, the decision below is supported, we submit, by the fact that (R. 258):

> The patent rights secured from the United States clearly specify that the chains were adaptable for use on automobiles to prevent skidding. They were described as primarily useful for this purpose.

See Exhibits A, C, and E, admitted in evidence R. 145; Exhibit B, admitted in evidence, R. 81. It would seem almost obvious that an article manufactured under a patent granted because of its primary usefulness in connection with automobiles was an article primarily adapted for such use.

The court below also pointed out (R. 258) that if Congress had intended to exempt an accessory like

tire chains it would have said so in the statute, just as it did say specifically that tractors should not be subject to tax. Instead, it used generic words, which must be given a broad construction to effect the statutory purpose. As this Court said in *Universal Battery Co.* v. *United States*, 281 U.S. 580, 583:

> Thus the scheme of taxation embodied in these provisions centers around the motor vehicles enumerated therein. Their sale is the principal thing that is taxed, and the sale of parts or accessories "for" such vehicles is taxed because the parts and accessories are within the same field with the vehicles and used to the same ends.

This conclusion, we submit, requires the affirmance of the judgment below.

III

THE CIRCUIT COURT OF APPEALS HAD AUTHORITY TO REVIEW THE JUDGMENT OF THE DISTRICT COURT

The petitioner asserts (Br. 25) that "The Circuit Court of Appeals overruled certain findings of fact of the district court and conclusions of law thereon, and substituted therefor its own findings of fact and conclusions of law." The petitioner contends (Br. 31) that what the Circuit Court of Appeals did was erroneous on the ground that there were no special findings of fact and that (Br. 32) "in the absence of special findings the general findings of the District Court are conclusive upon all

matters of fact and prevent any inquiry into the conclusions of law embodied therein, except the rulings made during the progress of the trial."

The present case was tried before the court without a jury, in accordance with a written stipulation (R. 12, 51, 63). The court filed an opinion (R. 16–32) in which it segregated the facts relating to the issue arising under Section 900 of the Revenue Act of 1921; and directly following this statement of the facts it stated its reasoning and conclusions on that branch of the case. Later, at the same term [5] and before any appeal to the Circuit Court of Appeals, the District Judge made an order directing that the findings of fact and conclusions of law set forth in the opinion "shall constitute Special Findings of Fact and Conclusions of Law" (R. 43, 56, 69).

In our brief in opposition (pp. 7–9) we have contended that the findings made by the District Judge were "special findings" and the cases cited by the petitioner have been distinguished. We do not repeat that argument here, because it seems to us to make little or no difference whether the findings be regarded as general or special. If the findings were special, the Circuit Court of Appeals had power to determine whether the ultimate conclusion was supported by the subordinate facts found. *Cf. United States* v. *Pugh*, 99 U.S. 265. The Circuit Court of Appeals concluded as a matter of law that

[5] See Rule 20 of the Rules of the District Court for the District of Connecticut (*infra*, p. 30).

the "chief use" of an article was the primary test of its taxability as a "part or accessory", and on this view of the law it had authority to decide that the subordinate facts found by the District Court did not support the judgment for the taxpayer.

But, whether the findings of the trial court are considered as general or special, there still remain open for review "the rulings made during the progress of the trial," as the petitioners themselves state (Br. 32). There were several such rulings in this case. During the trial, and at the close of all the evidence, the respondent made a motion for judgment (R. 227, 13, 51, 64). Among the grounds upon which this motion was based was the assertion that the evidence was not sufficient to show that the petitioner's chains "were not primarily adapted for use in connection with" automobiles (R. 14, 52, 64–65). Other grounds of the motion were closely related to this one and plainly raised the legal question of the sufficiency of the evidence to support a finding for the taxpayer. Thereafter, the court denied the respondent's motion for judgment and an exception was allowed which duly appears in the bill of exceptions (R. 228).[6] Under these circumstances, we submit, whether the findings be regarded as special or not, the question whether

[6] The respondent also presented proposed findings of fact and conclusions of law (R. 36–41, 51, 63), the filing of which is recorded in the bill of exceptions (R. 228). These requested rulings were denied by the entry of the judgment in favor of the taxpayer, and exceptions were duly allowed (R. 228).

the judgment was supported by any evidence was open for review in the Circuit Court of Appeals.[7] The question is plainly concluded by this Court's decision in *Maryland Casualty Co.* v. *Jones,* 279 U.S. 792. There, in a case tried before the court without a jury, the defendant made a motion for nonsuit. This Court held (p. 795–796) that—

> This presented a question of law which is reviewable—just as a motion by the plaintiff at the close of a trial without the intervention of a jury, for a declaration that he is entitled to judgment, presents a question of law which is reviewable by the appellate court.[8]

---

[7] The trial court's overruling of the motion for judgment and its refusal to adopt the respondent's requested conclusions of law were assigned as error in the Circuit Court of Appeals (R. 247). Contrary to the petitioner's statement (Br. 31), these assignments of error were set forth in full in the Government's brief in the Circuit Court of Appeals, and both the respondent's brief and its reply brief were devoted primarily to the contention that the evidence and findings showing that the chains were "equally adapted" for use on taxable and nontaxable motor vehicles were not sufficient to support the judgment for the taxpayer.

[8] Other cases to the same effect are *St. Louis* v. *Western Union Telegraph Co.*, 148 U.S. 92, 96; *Dunsmuir* v. *Scott*, 217 Fed. 200 (C.C.A. 9th); *Societe Nouvelle D'Armement* v. *Barnaby*, 246 Fed. 68 (C.C.A. 9th); *Pennok Oil Co.* v. *Roxana Petroleum Co.*, 289 Fed. 416 (C.C.A. 8th); *Bank of Waterproof* v. *Fidelity & Deposit Co.*, 299 Fed. 478 (C.C.A. 5th), certiorari denied, 266 U.S. 618; *Allen* v. *Cartan & Jeffrey Co.*, 7 F. (2d) 21 (C.C.A. 8th); *Griffin* v. *Thompson*, 10 F. (2d) 127 (C.C.A. 5th); *Stinson* v. *Business Men's Accident Ass'n*, 43 F. (2d) 312 (C.C.A. 10th); *Perry* v. *Wiggins*, 57 F. (2d) 622 (C.C.A. 8th), certiorari denied, 287 U.S. 609.

Besides the rulings during the trial already referred to, there were numerous rulings on the admission and exclusion of evidence to which exceptions were taken. These exceptions were duly incorporated in the bill of exceptions, and many of these rulings were assigned as error (R. 229–254). One of these exceptions related to the District Court's refusal to allow a witness to answer a question put by Government counsel as to whether the chief use of chains was not in fact in connection with automobiles and trucks (R. 182). This ruling was assigned as error (Assignment of Error XXIII; R. 240). It seems obvious that this exception presented squarely the question of law which was the basis of the Circuit Court of Appeals' decision—whether the chief use of an article is a factor in determining its taxability as a "part or accessory."

This analysis of the record makes it plain, we submit, that the questions passed on by the Circuit Court of Appeals were properly before it, and that there is no merit in the petitioner's contention that the court below exceeded its authority in reversing the District Court. In reaching this conclusion, it is wholly immaterial whether the District Court's decision be regarded as based on special findings or on a general finding and conclusion in favor of the taxpayer.

CONCLUSION

The court below did not exceed its power in reversing the decision of the trial court, and its conclusion that the chief use of an article is a factor in determining its taxability as a "part or accessory" is sound. Even if the petitioner's chains were not subject to tax as parts or accessories, recovery is barred by Section 424 of the Revenue Act of 1928. The judgment below is correct and should be affirmed.

Respectfully submitted.

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NOVEMBER 1933.

APPENDIX

STATUTES AND OTHER AUTHORITIES INVOLVED

Revised Statutes:

> SEC. 649. Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury. (U.S.C., Title 28, Sec. 773.)
>
> SEC. 700. When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment. (U.S.C., Title 28, Sec. 875.)

Revenue Act of 1921, c. 136, 42 Stat. 227, 291:

> SEC. 900. That from and after January 1, 1922, there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following

percentages of the price for which so sold or leased—

(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;

(2) Other automobiles and motorcycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;

(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivisions (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum;

* * * * *

Revenue Act of 1924, c. 234, 43 Stat. 253, 322:

SEC. 600. On and after the expiration of thirty days after the enactment of this Act there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentage of the price for which so sold or leased—

(1) Automobile truck chassis and automobile wagon chassis sold or leased for an amount in excess of $1,000, and automobile truck bodies and automobile wagon bodies sold or leased for an amount in excess of $200 (including in both cases tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the sale thereof), 3 per centum. * * *

(2) Other automobile chassis and bodies and motor cycles (including tires, inner tubes, parts, and accessories therefor sold

on or in connection therewith or with the sale thereof), except tractors, 5 per centum. * * *

(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 2½ per centum. * * * (U.S.C., Title 26, Sec. 881.)

Revenue Act of 1928, c. 852, 45 Stat. 791, 866:

SEC. 424. REFUND OF AUTOMOBILE ACCESSORIES TAX

(a) No refund shall be made of any amount paid by or collected from any manufacturer, producer, or importer in respect of the tax imposed by subdivision (3) of section 600 of the Revenue Act of 1924, or subdivision (3) of section 900 of the Revenue Act of 1921 or of the Revenue Act of 1918, unless either—

(1) Pursuant to a judgment of a court in an action duly begun prior to April 30, 1928; or

(2) It is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of an article subject to tax, or that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him; or

(3) The Commissioner certifies to the proper disbursing officer that such manufacturer, producer, or importer has filed with the Commissioner, under regulations prescribed by the Commissioner with the approval of the Secretary, a bond in such sum and with such sureties as the Commissioner

deems necessary, conditioned upon the immediate repayment to the United States of such portion of the amount refunded as is not distributed by such manufacturer, producer, or importer, within six months after the date of the payment of the refund, to the persons who purchased for purposes of consumption (whether from such manufacturer, producer, importer, or from any other person) the articles in respect of which the refund is made, as evidenced by the affidavits (in such form and containing such statements as the Commissioner may prescribe) of such purchasers, and that such bond, in the case of a claim allowed after February 28, 1927, was filed before the allowance of the claim by the Commissioner.

* * * * *

Treasury Regulations 47, Revised December 1921:

ART. 14. *Tires, inner tubes, parts, and accessories sold to manufacturers.*—The words "tires, inner tubes, parts, or accessories" shall be understood to embrace only such tires, inner tubes, parts, or accessories as have reached such a stage of manufacture that they constitute articles commonly or commercially known as "tires, inner tubes, parts, or accessories" and shall not be understood to embrace raw materials used in the manufacture of such articles.

* * * * *

Any article which has reached a state of manufacture wherein it is in itself a component part or accessory, and is of such a nature that it may be used or attached by an ordinary repair man or individual user as distinguished from a manufacturer or pro-

ducer, is subject to tax as a "part or accessory."

* * * * *

ART. 15. *Definition of parts.*—A "part" for an automobile truck, automobile wagon, other automobile, or motor cycle is any article designed or manufactured for the special purpose of being used as or to replace a component part of any such vehicle and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use and which is primarily adapted only for use as a component part of such vehicle.

* * * * *

Mere stock or commercial commodities, such as bolts, nuts, washers, screws, etc., though used as components for such vehicles, are not "parts" within the meaning of subdivision (3). Articles, however, which ordinarily would be classed as commercial commodities become parts when, because of their design or construction, they are primarily adapted for use as component parts of such vehicles.

* * * * *

ART. 16. *Definition of accessories.*—An "accessory" for an automobile truck, automobile wagon, other automobile, or motorcycle is any article designed to be attached to or used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for use in connection with such vehicle, whether or not essential to its operation.

* * * * *

Articles which have a general commercial use and which are not especially designed and peculiarly adapted for use in connec-

tion with automobile trucks, automobile wagons, other automobiles, or motorcycles are not subject to tax as "parts" or "accessories." * * *

If any doubt exists as to the special adaptability of any article, the fact of its sale by the manufacturer to be used with an automobile, or to an automobile accessories dealer, would determine its taxability.

* * * * *

Treasury Regulations 47, Revised August 1924:

ART. 15. *Tires, inner tubes, parts and accessories sold to manufacturers.*—The tax of 2½ percent applies to *all* tires, inner tubes, parts, or accessories sold separately by the manufacturer thereof, unless the sale is made to a manufacturer who furnishes a certificate in the form provided in this article for the exemption of such sale. * * *

The words "tires, inner tubes, parts, or accessories" shall be understood to embrace only such tires, inner tubes, parts, or accessories as have reached such a stage of manufacture that they constitute articles commonly or commercially known as "tires, inner tubes, parts, or accessories," and shall not be understood to embrace raw materials used in the manufacture of such articles.

* * * * *

ART. 16. *Parts or accessories—Definition of parts.*—A "part" for an automobile truck, automobile wagon, or other automobile chassis or body, or motorcycle, is any article designed or manufactured for the special purpose of being used as, or to improve, repair, or replace, a component part of any such vehicle, or article, and which by reason of some peculiar characteristic is not

such a commercial commodity as would ordinarily be sold for general use, or which is primarily adapted only for use as a component part of such vehicle or article.

Definition of accessories.—An "accessory" for an automobile truck, automobile wagon, or other automobile chassis or body, or motorcycle, is any article designed to be attached to or used in connection with such vehicle or article to add to its utility or ornamentation, or any article which is primarily adapted for use in connection with such vehicle or article whether or not essential to its operation or use.

* * * * *

Articles which have a general commercial use and which are not especially designed or peculiarly adapted for use in connection with automobile truck, automobile wagon, or other automobile chassis or bodies, or motorcycles, are not subject to tax as "parts or accessories." * * *.

Mere stock or commercial commodities such as bolts, nuts, washers, screws, etc., though used as components for taxable articles, are not "parts" within the meaning of subdivision (3) when sold separately. Articles, however, which ordinarily would be classed as commercial commodities become parts when, because of their design or construction, they are primarily adapted for use as component parts of such vehicles.

* * * * *

Parts or accessories for automobile trucks, automobile wagons, other automobiles, or motorcycles, primarily adapted for use on or in connection therewith are taxable when sold by the manufacturer thereof regardless of the purpose for which used.

Rules of the District Court of the United States for the District of Connecticut:

20. Extension of Terms

For the purpose of making and filing bills of exceptions and making any and all motions necessary to be made within the term at which any judgment or decree is entered, each term of this Court shall be, and hereby is, extended so as to comprise a period of three calendar months beginning on the first Tuesday of the month in which verdict is rendered, or judgment or decree entered.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. 196

AMERICAN CHAIN COMPANY, INC., *Petitioner,*

v.

ROBERT O. EATON, *Collector of Internal Revenue For The District of Connecticut, Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 329

C. F. ROUTZAHN, *Collector of Internal Revenue of the United States for the Eighteenth District of Ohio, Petitioner,*

v.

WILLARD STORAGE BATTERY COMPANY, *a Corporation, Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

May it please the Court:

The undersigned respectfully moves this Honorable Court for leave to file the accompanying brief in the above cases as *amicus curiae.*

GEORGE M. MORRIS,
Amicus Curiae.

IN THE

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF GEORGE M. MORRIS AS AMICUS CURIAE

The Purpose of This Brief

This Court has been asked[1] to modify the test previously laid down by it[2] for determining whether cer-

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1. Petitioner's brief, pp. 6, 9-21, *Routzahn* v. *Willard Storage Battery Company*, No. 329. Responder 's brief, pp. 14-16, *American Chain Co.* v. *Eaton*, No. 196.
2. *Universal Battery Company* v. *United States*, 281 U. S. 580, 74 L. ed. 1051 (May 26, 1930).

tain articles are "automobile parts or accessories."

It is the purpose of this brief to point out the injustice and folly of making any modification of the existing law upon which taxpayer and Government alike have relied for many years.

I

The Doctrine of Universal Battery Company v. United States, as Interpreted by the Courts, Should Not Now Be Disturbed.

More than three years ago, this Court sustained the ten year old Treasury Regulations defining what constitutes a part or accessory for an automobile.[3] In the three years since the *Universal Battery Company* decision, the courts have consistently followed the test laid down in that case. In only one[4] of the twenty-one opinions[5] which have since been ren-

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3. *Universal Battery Company* v. *United States*, 281 U. S. 580 at 583.
4. *Eaton* v. *American Chain Co.*, 63 F. (2d) 783 (C. C. A. 2, March 6, 1933), now pending in this Court as No. 196, October Term, 1933.
5. *American Chain Co.* v. *Eaton*, 58 F. (2d) 246 (D. C. Conn., Feb. 5, 1931), 63 F. (2d) 783 (C. C. A. 2, Mar. 6, 1933);
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Electric Storage Battery Co. v. *McCaughn*, 52 F. (2d) 205 (D. C. E. D. Penna., Apr. 28, 1931); 63 F. (2d) 715 (C. C. A. 3, Jan. 31, 1933);

dered, some in favor of and some against the Government, is there even an appearance of any confusion concerning that test. While there is no published record of the number of decisions by the Bureau of Internal Revenue which have followed the *Universal Battery Company* decision, in at least ten of the cases involving the taxability of articles as parts or accessories which are now pending before the Court of Claims alone,[6] the evidence has been taken and the

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5. Continued—
Englert Mfg. Co. v. *United States*, 3 F. Supp. 873 (C. Cls. June 5, 1933);
Fairmont Tool & Forging Co. v. *United States*, 42 F. (2d) 591 (C. Cls. June 16, 1930);
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M and M Co. v. *United States*, 3 F. Supp. 886 (C. Cls. June 5, 1933);
Perfection Gear Co. v. *United States*, 41 F. (2d) 561 (C. Cls. June 16, 1930);
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6. *American Bosch Magneto Corp.* v. *United States*, Nos. H-516, H-517; *New Process Gear Co.* v. *United States*, H-466; *United States Gear Co.* v. *United States*, H-455; *Parts Corporation* v. *United States*, H-500; *Kokomo Automotive Mfg. Co.* v. *United States*, H-386; *Mechanics Machine Co.* v. *United States*, J-24; *Dalton & Balch, Inc.* v. *United States*, K-372; *Taher Auto Spring Co., Inc.*,

record made upon the basis of this Court's rulings in the *Universal* case.

This Court said in the *Universal Battery Company* case[7] that the construction of the law made by the administrative regulations (fully approved by this Court in that case) "had been adhered to in the Bureau of Internal Revenue for about ten years and ought not to be disturbed now unless plainly wrong." If that conclusion was sound when reached it should be doubly so now in view of the court judgments, Bureau rulings and cases tried since that pronouncement. Increased litigation, unnecessary expense and injustice to all concerned would result from either an enlargement or diminution of the boundaries previously run by this Court, and repeatedly retraced by the lower courts.

Great care may properly be urged upon this Court, therefore, to avoid opening again the questions which the *Universal* decision adequately closed.

II

The Request for Modification in the Existing Rule Has No Support in Law or Administrative Experience.

In *Universal Battery Company* v. *United States*,[8] this Court confirmed the test established by the Treasury Department and the Bureau of Internal

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6. Continued—
v. *United States*, K-458; *Virginia-Carolina Rubber Co.* v. *United States*, M-363; *Nelson Brothers* v. *United States*, K-305.

7. 281 U. S. 580 at 583.

8. 281 U. S. 580 at 583.

Revenue for determining what constitutes a "part" or "accessory," in the following language:

> "The administrative regulations issued under §900 uniformly have construed the term 'part' in that section as meaning any article designed or manufactured for the special purpose of being used as, or to replace, a component part of such vehicle, [automobile truck, automobile wagon, other automobile or motorcycle] and which by reason of some characteristic is not such a commercial article as ordinarily would be sold for general use, but is primarily adapted for use as a component part of such vehicle. The regulations also have construed the term 'accessory' as meaning any article designed to be used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for such use, whether or not essential to the operation of the vehicle.
>
> "This construction of those terms has been adhered to in the Internal Revenue Bureau for about ten years and it ought not to be disturbed now unless it be plainly wrong. We think it is not so, but is an admissible construction. Certainly, it would be unreasonable to hold that articles equally adapted to a variety of uses and commonly put to such uses, one of which is use in motor vehicles, must be classified as parts or accessories for such vehicles. And it would be also unreasonable to hold that articles can be so classified only where they are adapted solely for use in motor vehicles and are exclusively so used. *Magone* v. *Wiederer*, 159 U. S. 555, 559, 40 L. ed. 258, 259, 16 Sup. Ct. Rep. 122. We think

> the view taken in the administrative regulations is reasonable and should be upheld. It is that articles primarily adapted for use in motor vehicles are to be regarded as parts or accessories of such vehicles, even though there has been some other use of the articles for which they are not so well adapted."

In at least two cases[9] now pending before this Court the Government appears to urge that the foregoing ruling is inadequate. The contention is that the rule should place upon the taxpayer the burden of showing that the "chief use" of the article questioned is for other than automobile purposes, this to be accomplished by a demonstration that a greater number of the articles were used for non-automobile than for automobile purposes. This contention is grounded upon the theory that the "chief use" of an article is that use to which in a majority of instances it is put. Neither the theory nor the contention accords with established law.

The term "chief use" has had a settled meaning ever since 1893 when this Court in *Magone* v. *Heller*, 150 U. S. 70, 37 L. ed. 1001, created the practical instrument for determining existence or non-existence of chief use in each case. In that case the issue was whether a certain salt was chiefly, or expressly, used for manure. This Court said:

> "If the only common use of a substance is to be made into manure, or to be itself spread

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9. *Routzahn* v. *Willard Storage Battery Co.*, No. 329, petitioner's brief, pp. 6, 9-21, and *American Chain Company* v. *Eaton*, No. 196, respondent's brief, pp. 14-16.

> upon the land as manure, the fact that occasionally, or by way of experiment, it is used for a different purpose, will not take it out of the exemption. But if it is *commonly; practically* and *profitably* used for a different purpose, it cannot be considered as 'expressly used for manure,' even if in the majority of instances it is so used." (Italics supplied.)

Here we have an express adoption of common and practical use for more than one purpose, and a rejection of majority of instances, as the test for "chief use."

This test for chief use was confirmed by this Court in *Magone* v. *Wiederer*, 159 U. S. 555, 40 L. ed. 258. There, after quoting the above language, the Court said (at p. 562):

> "It follows that whilst *Magone* v. *Heller* adhered to the settled rule of chief use, a guide was there announced by which to discover whether the facts established such chief use. * * * Thus, we repeat, *Magone* v. *Heller*, whilst enforcing and applying the rule of chief use, furnished the instrument for determining and measuring its operation and giving certainty to its application."

The question before the Court in *Magone* v. *Wiederer* was the correctness of a charge to the jury by the District Court judge to the effect that if certain glass was just as applicable for different uses as for use in clocks, then it could not be said that its chief

use was for clocks. In upholding the charge below[10] this Court said:

> "The charge given by the Court below, and which was excepted to, was manifestly correct, for in giving the rule of chief use the principles by which chief use was to be ascertained were fully stated exactly in accordance with the law subsequently announced by this Court in *Magone* v. *Heller*."

As the result of these two decisions it has been settled for forty years that if an article is commonly, practically and profitably used for more than one

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10. The charge of the court below read:

"In determining this question, whether or not these articles are parts of clocks, it will not be necessary for you to say that they were exclusively used for that purpose. An article may be chiefly used for a certain purpose and be diverted from its principal use; somebody may put it to a purpose for which it was not originally intended. That could not, in my judgment, change its tariff nomenclature. The Supreme Court, in a case which I think is somewhat similar upon the facts, although relating to different sections of the statute, sustained a charge to the jury '*that the use to which the articles were chiefly adapted and for which they were used determined their character within the meaning of the statute.* * * *' And so I will say to you, as the law of the case, as I understand it, that if you find that these articles were chiefly used as parts of clocks, that that would determine their tariff classification. But it is entirely clear, upon the other hand, that they must be chiefly and principally used for that purpose. If they are articles, all, or one or more, as the case may be, which have no distinguishing characteristics, which are just as applicable for use in fancy boxes or in coach lamps as they are for clocks, just as applicable to the one use as to the other, then it would be entirely proper to say that they have no distinguishing characteristice as parts of clocks. They might be used for one purpose just as well as for another. And if you find as to those articles, or any of them, that they have several uses to which they are perfectly applicable, then as to those articles your verdict should be for the defendant." (Italics supplied.)

purpose, it cannot be considered to have a chief use even though the larger number of the articles are employed in any one use.

The test for determining "chief use" is the same test employed by the Treasury Department, the Bureau of Internal Revenue and this Court for determining whether an article is taxable as an automobile part or accessory.

The Regulations promulgated by the Treasury Department[11] require the taxation as parts or accessories, of articles "primarily adapted" for automobile use. Articles having a general commercial use, or ordinarily sold for general use, the Regulations provide, cannot be considered as "primarily adapted" for automobile use. The Bureau of Internal Revenue has consistently applied this rule.

Miniature incandescent electric light bulbs "for use in automobiles" were viewed by the Bureau as nontaxable when sold separately because they were

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11. The first Regulations dealing with parts and accessories under Section 900, Revenue Act of 1918 were Articles 14, 15 and 16 of the Regulations 47, promulgated May 1, 1919. These Regulations were amended by Treasury Decision 2852, promulgated May 31, 1919, amending Articles 14 and 16; Treasury Decision 2893, promulgated July 17, 1919, amending Articles 14 and 16; Treasury Decision 2915, promulgated September 3, 1919, amending Article 14, and Treasury Decision 2989, promulgated March 3, 1920, amending Articles 14, 15 and 16. The first revision of Regulations 47 was published December 27, 1920. This revision was amended by Treasury Decision 3116, promulgated January 14, 1921, amending Article 15, and by Treasury Decision 3207, promulgated July 29, 1921, amending Article 15. A second revision of Treasury Regulations 47 was promulgated January 6, 1922. A third revision was promulgated August 29, 1924. These Regulations and amendments were collected and printed by petitioner in *Universal Battery Co.* v. *United States*, No. 127, October Term, 1929, and filed as a supplement to the brief therein.

"commercial commodities."[12] Leaf springs, because they "in their present form and design have been in use for a great many years and were used long before the advent of the automobile," "had been for many years and are today used for a great many purposes other than in automobiles," and "exactly the same spring in type and otherwise can be and is used for automobile and other purposes" were held not "primarily adapted" for automobile use.[13] Piston rings "generally as commercial commodities" were exempted by the Bureau.[14] The fact that spark plugs[15] and

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12. Sales Tax Ruling 408, Internal Revenue Cumulative Bulletin Vol. II-1, p. 285.
13. Sales Tax Ruling 395, Internal Revenue Cumulative Bulletin Vol. I-2, p. 295.
14. Sales Tax Ruling 380, Internal Revenue Cumulative Bulletin Vol. I-1, p. 444.
15. Sales Tax Ruling 426, Internal Revenue Cumulative Bulletin Vol. II-2, p. 308, 309.

"It is a well-known fact that spark plugs were in use for many years before automobiles came into existence. It is also common knowledge that they were used on all kinds of internal-combustion engines, both stationary and portable. * * * While they are used very extensively in automobiles, the same plugs are used in motor boats, airplanes, farm tractors, road graders, railway locomotive engines, thrashing engines, concrete mixers, water pumps, hoisting machines, and for innumerable other purposes.

* * * * * * *

"Applying the principle in the above cases to spark plugs, where it is clearly shown that the articles in question are not specially designed nor primarily adaptable only for use on or in connection with automobiles but are interchangeable and extensively used in many other industries, it is the opinion of this office that spark plugs should be held to be commercial commodities and not subject to the excise tax imposed by sections 900 (3) of the Revenue Acts of 1918 and 1921."

grease guns[16] were widely used commercially for a variety of purposes, only one of which was in connection with automobiles, turned the Bureau's decision as to those articles.

From the regulations and actual practice of the Bureau of Internal Revenue it is apparent that the term "primarily adapted" has the same meaning to the officials concerned with sound and workable tests for administering the tax law, as the term "chief use" has to this Court.[17] The "majority use" test was as completely ignored by them as it was rejected by this Court in *Magone* v. *Heller*, 150 U. S. 70 at 75.

The test found workable and sound by this Court forty years ago, and adopted and consistently employed in the Treasury Department regulations and Bureau of Internal Revenue rulings, was expressly affirmed by this Court in *Universal Battery Company* v. *United States*, 281 U. S. 580. When, therefore, complaint is made of failure by the Courts to con-

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16. Sales Tax Ruling 422, Internal Revenue Cumulative Bulletin Vol. II-2, p. 310.
Grease guns were not primarily adapted for automobile use, the Bureau ruled, because:
"From the information submitted it appears that high pressure grease guns are not primarily designed and adaptable for use on automobiles but are used in many industries where lubrication is necessary."

17. The parents of the provisions in the Treasury Regulations respecting the tests for determining what constitutes a part or accessory under the excise tax laws, are clearly the opinions of this Court in *Magone* v. *Heller*, 150 U. S. 70, *Magone* v. *Wiederer*, 159 U. S. 555, and the cases which preceded them. Such terms as "chiefly used," "chiefly adapted," etc., in those opinions become "primarily adapted" or "peculiarly adapted" in the later Regulations. "Commonly, practically and profitably used" in the old cases, becomes "general commercial use" or "commercial commodity" in the new Regulations and in the applications thereof.

sider the chief use of an article in determining whether it is a part or accessory for an automobile, the answer is that the chief use test actually has been employed when the test for primary adaptability of the part has been employed. When the complaint is made[18] that the courts have erred in failing to require a manufacturer to show that the greatest use of an article is for non-automobile purposes in order to establish that his product is not a part or accessory for automobiles, the answers are two. First, the chief use doctrine (cited as authority for the complaint) never included such a requirement, and second, this Court expressly in *Magone* v. *Heller*, 150 U. S. 70, 75, and impliedly in *Universal Battery Company* v. *United States*, 281 U. S. 580, rejected any such criterion.

The suggestion for modification of the rule in *Universal Battery Company* v. *United States*, 281 U. S. 580, has no foundation in law or in administrative experience. Modification should not be undertaken.

III

Requiring the Ascertainment of Primary Adaptation or Chief Use to Depend Upon a Majority Count Is Not Administratively Feasible.

In the cases now at this bar an effort is being made to make the issue of primary adaptation and chief use turn only upon actual count. It is submitted

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18. Government's brief, pp. 14-16, *American Chain Co.* v. *Eaton*, No. 196; Government's brief, p. 10, *Routzahn* v. *Willard Storage Battery Co.*, No. 329.

that this is the argument of an advocate and not that of an administrator of the tax laws. The administrative difficulties involved in such a rule foreclose its adoption.

As an example: Administratively, what would be determined where a count shows that in certain seasons of the year the majority of articles sold were employed for one use while in another season the majority sold were employed for another use?[19] Would the article be taxable as a part of device A from April to September but not taxable from October to March because its "majority" use was with device B in that period?

Again as an example, suppose that one manufacturer, or importer, sells a major portion of his product to the A trade while another sells the major portion of a product identical in design, purpose and construction, to the B trade.[20] What is the use of the article under the "majority" rule now urged? Is one of these producers to be taxed and the other not, or is the taxability to rest upon figures and information known only to other manufacturers or producers to which neither of the first two have access nor right?

Again, suppose a count would show that 35 per

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19. In *Englert Manufacturing Co.* v. *United States*, 3 F. Supp. 873, the experience of the witnesses was that the major use of their storage batteries in the winter months was in radios, while in the summer months the majority use was probably in automobiles.

20. In *Englert Manufacturing Co.* v. *United States*, 3 F. Supp. 873, one witness sold the storage batteries taxed almost exclusively to the radio sending and receiving trade. Another witness made most of his sales to the automobile trade.

cent of a certain article were used with device W, 35 per cent with device X, 20 per cent with device Y and 10 per cent with device Z. With what device is the major use?

As the rule stands at present, the difficulties in all such situations are not present. If there really exist substantial, common, practical, uses of an article beyond its employment on a single device, submission of these data to the tax, or tariff, administrator should dispose of most disputes. If, on the other hand, the disposition must await a majority count the answer might be interminably delayed. The probabilities of such delays would violate a fundamental principle in good tax administration.

Under the "count" rule now urged on the Court only a national, or possibly international, detailed and frequently repeated census would accurately determine the majority use of any article. The ordinary manufacturer, or importer, could not undertake such a task. Only an extensive governmental agency, therefore, could accomplish such undertakings and it is difficult to conceive of any but a rare occasion where the result would warrant the expense.

Once departure is made in the direction urged, certain it is that the question of chief use and primary adaptability will return again and again to vex this Court and the subsidiary courts adjudicating the excise tax and tariff laws. The doctrine first pronounced in *Magone* v. *Heller*, 150 U. S. 70, in 1893, approved in *Magone* v. *Wiederer*, 159 U. S. 555, and re-affirmed in *Universal Battery Company* v. *United States*, 281 U. S. 580, is clear, has been universally

accepted and has stood the test of administration satisfactorily. No modification is called for and none should be made.

Respectfully submitted,

GEORGE M. MORRIS,
Amicus Curiae.

Of Counsel,
KIXMILLER, BAAR & MORRIS.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 329

C. F. ROUTZAHN, COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES FOR THE EIGHTEENTH DISTRICT OF OHIO, PETITIONER

vs.

WILLARD STORAGE BATTERY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Theo. A. Willard	73	47
R. J. Nightingale	76	50
C. T. Klug	78	50
A. E. Harrold	81	53
E. M. Sutherland	85	56
M. J. Brennan	88	58
H. C. Negus	95	63
F. Denzel	97	64
W. E. Bend[illegible]	103	68
R. S. Van Cleve	105	70
L. G. Baldwin	109	72
L. J. Lechner	115	76
C. C. Schellentrager	115	77
L. W. Leonard	117	78
W. W. Parsons	119	79
C. E. Haas	120	80
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1 [Caption omitted.]

2 In United States District Court, Northern District of Ohio, Eastern Division

No. 15,761, Law

WILLARD STORAGE BATTERY COMPANY, A CORPORATION, Plaintiff

v.

C. F. ROUTZAHN, COLLECTOR OF INTERNAL REVENUE OF THE UNITED States for the Eighteenth District of Ohio, Defendant

---

No. 15,762, Law

WILLARD STORAGE BATTERY COMPANY, A CORPORATION, Plaintiff

v.

C. F. ROUTZAHN, COLLECTOR OF INTERNAL REVENUE OF THE UNITED States for the Eighteenth District of Ohio, Defendant

---

WILLARD STORAGE BATTERY COMPANY, A CORPORATION, Plaintiff

v.

C. F. ROUTZAHN, COLLECTOR OF INTERNAL REVENUE OF THE UNITED States for the Eighteenth District of Ohio, Defendant

---

No. 15,763, Law

WILLARD STORAGE BATTERY COMPANY, A CORPORATION, Plaintiff

v.

C. F. ROUTZAHN, COLLECTOR OF INTERNAL REVENUE OF THE UNITED States for the Eighteenth District of Ohio, Defendant

---

No. 15,764, Law

WILLARD STORAGE BATTERY COMPANY, A CORPORATION, Plaintiff

v.

C. F. ROUTZAHN, COLLECTOR OF INTERNAL REVENUE OF THE UNITED States for the Eighteenth District of Ohio, Defendant

---

No. 15,765, Law

WILLARD STORAGE BATTERY COMPANY, A CORPORATION, Plaintiff

v.

C. F. ROUTZAHN, COLLECTOR OF INTERNAL REVENUE OF THE UNITED States for the Eighteenth District of Ohio, Defendant

3 *Petition*

Filed May 31, 1929, in no. 15761

This petition is filed by the plaintiff, Willard Storage Battery Company, a corporation, against the defendant, C. F. Routzahn,

collector of internal revenue of the United States for the 18th District of Ohio, to recover the sum of $89,195.36, with interest as hereinafter set forth, upon the cause of action of which the following is a statement:

1. Prior to September 1, 1922, and from that time to the present, the plaintiff was, and now is, a corporation organized and existing under the laws of the State of West Virginia, and during that time had and maintained, and now has and maintains, its manufacturing plant and principal place of business at 246 East 131st Street, in the city of Cleveland, in the State of Ohio, and at all times has been, and now is, a resident of the city of Cleveland, in the State of Ohio, in the United States of America.

2. On or about September 1, 1922, and continuously from that date to the present, the said C. F. Routzahn was the duly appointed collector of internal revenue of the United States for the Eighteenth District of Ohio, in which is located the city of Cleveland, in the State of Ohio, and at all times herein mentioned was, and now is, a citizen and resident of the Northern District of Ohio, Eastern Division.

3. Prior to September 1, 1922, and from that date continuously to the present time, the plaintiff has been, and now is, engaged in the manufacture and sale of electric storage batteries at its said plant at no. 246 East 131st Street in the city of Cleveland aforesaid.

4. In each calendar month, during the period beginning on September 1, 1922, and ending on December 31, 1922, the plaintiff made sales of electric storage batteries, all of which sales were made to persons other than manufacturers of automobile trucks, automobile wagons, other automobiles or motorcycles, and on or before the last day of the calendar month then immediately succeeding each of the said months in which the said sales were made in accordance with the requirements, and upon the demand of, the defendant, made a return in accordance with the provisions of

4 title IX, section 900 of the United States Revenue Act of 1921, of the computation of manufacturer's excise taxes at the rate of five (5) per centum of the selling prices of the said electric storage batteries upon the sales thereof made by the plaintiff in each immediately preceding calendar month. The forms for the said returns were substantially alike, but were revised from time to time during the said period by the Commissioner of Internal Revenue; and, when filled in and made by the plaintiff, were delivered to the defendant by the plaintiff. The amount of the said manufacturer's excise tax was set forth in each of the said returns in a single sum, and represented the computation of five (5) per centum upon the selling price of the said electric storage batteries which had been sold by the plaintiff during the then preceding calendar month. A true copy of one of the said returns is hereunto attached, marked "Exhibit A" and made part hereof, and is sub-

mitted as a sample of, except as the same was revised as aforesaid, all such returns made by the plaintiff.

5. Heretofore, to wit, on the dates set forth in a statement thereof hereunto attached, marked "Exhibit B" and made part hereof, the plaintiff paid to the defendant, and the defendant collected from the plaintiff, the sums of money set opposite each of the several dates as set forth in "Exhibit B", which said sums of money amounted in the aggregate to the sum of $89,195.36, and were paid by the plaintiff upon the demand of the defendant as manufacturer's excise taxes upon the selling price of electric storage batteries which were manufactured by the plaintiff, and sold by the plaintiff during the respective calendar months set opposite the said several dates respectively set forth in "Exhibit B." All of said payments of taxes were made contemporaneously with, and in accordance with, the computation of the said excise taxes as set forth in the returns made by the plaintiff as hereinbefore described.

6. The electric storage batteries upon the selling prices of which the said taxes were paid by the plaintiff, as hereinbefore set forth, were commercial commodities, and were not specifically designed, nor primarily adaptable, only for use on, or in connection with, automobile trucks, automobile wagons, other automobiles or motorcycles, but were interchangeable for use in stationary and portable engines, and were, and are, extensively used in many industries other than the automobile truck, automobile wagon, other automobile and motorcycle industries.

7. The electric storage battery of the kind sold by the plaintiff during the period between September 1, 1922, and December 31, 1922, and upon the selling prices of which the said taxes were paid by the plaintiff upon the demand of the defendant, as hereinbefore set forth, was in general commercial use for many years before automobiles and automobile trucks and wagons came into existence, and were first used in the United States as a commercial commodity in or about the year 1859. In, or about, the year 1894, electric storage batteries were first used on, or in connection with, electric automotive vehicles only, and it was not until in, or about, the year 1911 that they were used on, or in connection with, automobile trucks, other automobiles or motorcycles (other than electric vehicles) and then only for the purpose of lighting. In, or about, the year 1915, electric storage batteries were first used on, or in connection with, automobiles other than electric vehicles, for purposes other than lighting.

8. The electric storage battery of the kind sold by the plaintiff during the aforesaid period, and upon the selling prices of which the said manufacturer's excise taxes were paid by the plaintiff upon the demand of the defendant, as hereinbefore set forth, is used, and for many years has been used, extensively in connection with motorboats, airplanes, tractors, locomotive engines, mine engines, submarines, artillery gun firing, lighting, turrent lighting and auxiliary

power, signalling devices in railroad systems and in military service, searchlights, telephone service, isolated lighting and power plants, street railways, fire alarm service, radio, and in a great many other industries and for a great many other purposes too numerous to mention.

9. The electric storage batteries which were sold by the plaintiff during the period beginning September 1, 1922, and ending on December 31, 1922, as aforesaid, did not constitute parts or accessories for any of the articles enumerated in subdivision (1) or (2) of title IX, section 900 of the United States Revenue Act of 1921, and neither said batteries or the sale thereof by the plaintiff were subject to the manufacturer's excise tax provided therein, and the defendant erroneously and illegally collected from the plaintiff as such manufacturer's excise taxes upon said sales the sum of $89,195.36 as set forth in "Exhibit B" hereunto attached.

10. There are attached hereto, marked "Exhibit C", and made part hereof, true and correct copies of the original receipts executed by the defendant for the taxes paid in each calendar month by the plaintiff to, and upon the demand of, the defendant as hereinbefore set forth, and true and correct copies of the checks of the plaintiff which were paid to and upon the demand of the defendant, and represented the payment of the taxes as set forth in the said receipts and upon each of which said checks appears the number imposed thereon by the defendant.

11. All of the taxes herebefore set forth were paid by the plaintiff upon the demand of the defendant and were paid by the plaintiff to the defendant under protest, as not being due or payable upon the sales of the electric storage batteries manufactured and sold by the plaintiff as aforesaid.

12. Heretofore, to wit, October 5, 1926, the plaintiff duly filed with the Commissioner of Internal Revenue of the United States a claim for the refund of the said manufacturer's excise taxes erroneously and illegally collected by the defendant from the plaintiff during the period beginning January 1, 1922, and ending on December 31, 1922, a true copy of which said claim is hereunto attached, marked "Exhibit D" and made part hereof; and thereafter, to wit, on or about November 3, 1926, the plaintiff filed with the Commissioner of Internal Revenue an amended claim for the refund of the said taxes erroneously and illegally collected by the defendant from the plaintiff during the period aforesaid, a true copy of which amended claim of refund is hereunto attached, marked "Exhibit E" and made part hereof. The plaintiff is informed that as to the taxes paid by it prior to October 5, 1922, its claim for refund was barred by the statute of limitations, and therefore makes no claim in this suit for taxes illegally and erroneously collected from it by the defendant prior to October 5, 1922. The said Commissioner of Internal Revenue, on or about June 21, 1927, rejected the said claim by letter bearing said date, a true copy of which said letter is hereunto attached, marked "Exhibit F" and made part hereof.

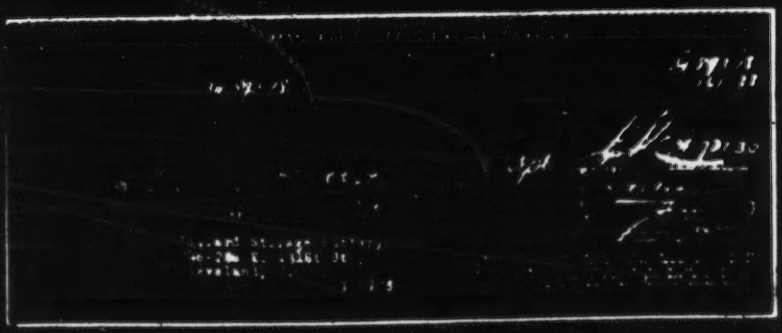
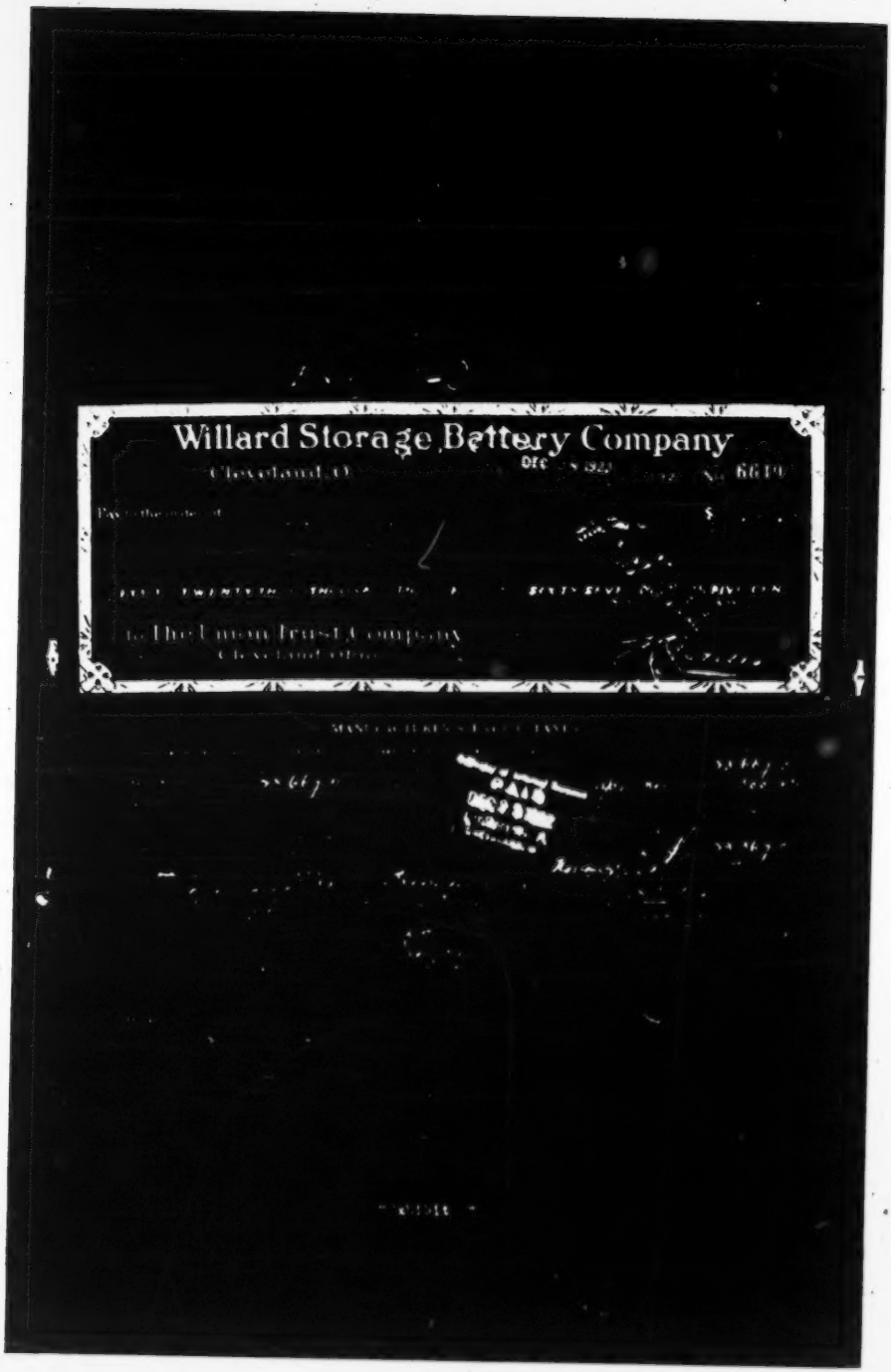
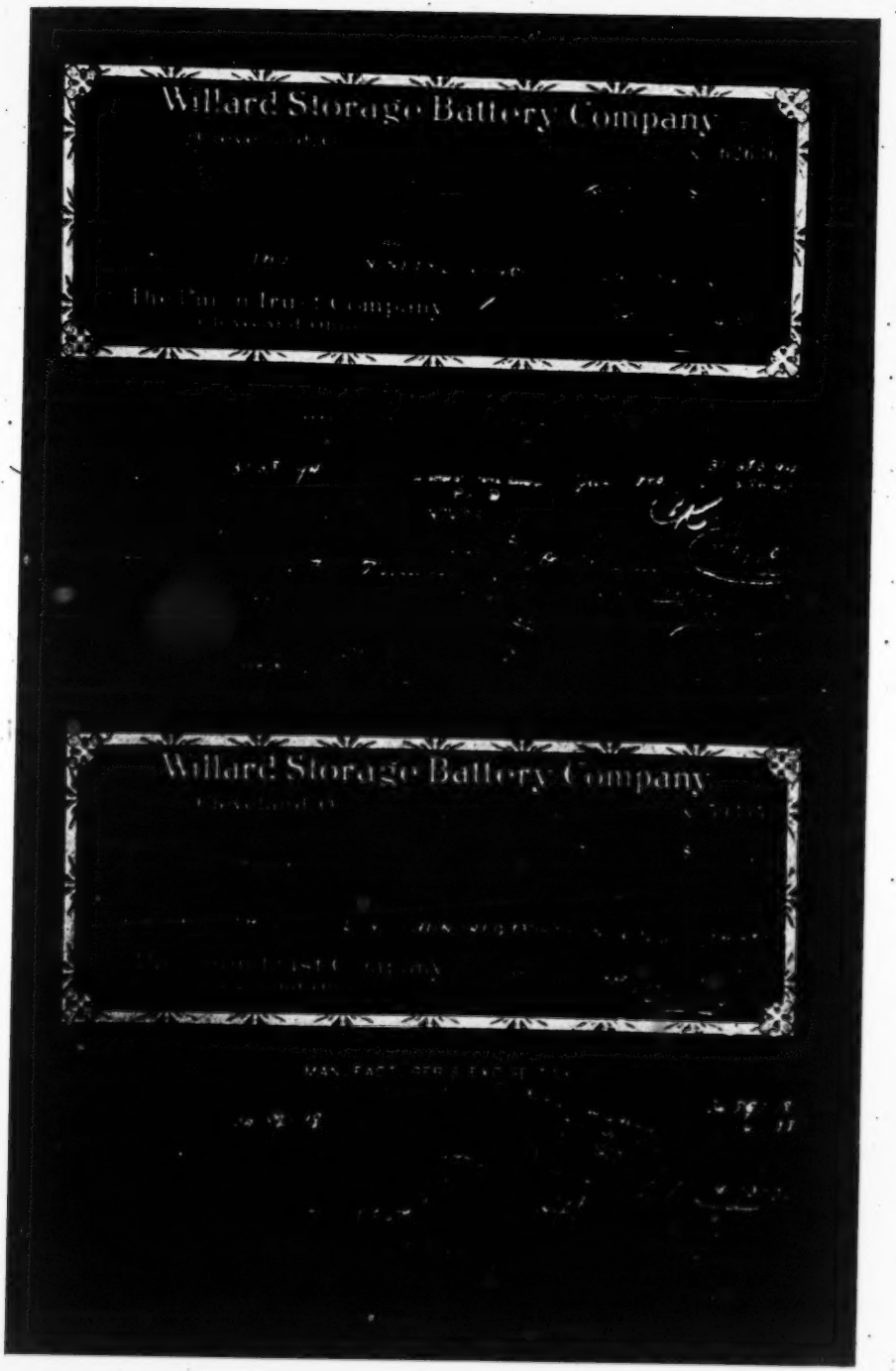


EXHIBIT-A


Willard Storage Battery Company
Cleveland, O.
No. 6619
to The Union Trust Company
Cleveland, Ohio


Willard Storage Battery Company
Willard Storage Battery Company

7 13. There is justly due by the defendant to the plaintiff, and the plaintiff prays that judgment may be entered in favor of the plaintiff and against the defendant in, the sum of $89,195.36, with interest upon each of the payments of the said manufacturer's excise taxes as set forth in exhibit B hereunto attached from the respective dates of such payments and for its costs herein expended.

WILLARD STORAGE BATTERY COMPANY,
CHARLES C. NORRIS, JR.,
Philadelphia, Pa.
By F. C. FRIEND, *Its Attorneys.*

[*Duly sworn to by C. H. Gibney, jurat omitted in printing.*]

PRAECIPE

To the Clerk of the said Court:

Issue summons for the defendant, returnable according to law, and endorse the same: Action for money judgment only. Amount claimed $89,195.36 with interest at the rate of 6% per annum as provided by law on $34,731.30 from October 30, 1922; on $31,097.01 from November 28, 1922; and on $23,367.05 from December 29, 1922, with costs.

CHARLES P. NORRIS, JR.,
Philadelphia, Pa. &
F. C. FRIEND,
Counsel for Plaintiff.

9 *Exhibit "B" to petition*

1922

Month of sales	Date of payment	Amount of tax paid
1922 September	1922 October 30	$34,731.30
October	" November 28	31,097.01
November	" December 29	23,367.05
		$89,195.36

13 *Exhibit "D" to petition*

(Execute separate form for each tax period)

Treasury Department
Internal Revenue Service
Form 843—Jan., 1922
Comptroller General U.S.
January 18, 1922

Collector's notation
Account number
District
Date received

Stamp here

Collector of
internal revenue

Claim for

Abatement of tax assessed.
Credit against outstanding assessments.
× Refund of taxes illegally collected.
Refund of amounts paid for stamps used in error or excess.

Important
File with collector of internal revenue where assessment was made. Not acceptable unless completely filled in.

Notice to collector
Collector must indicate in block above the kind of claim, except in income tax cases.

State of Ohio,
County of Cuyahoga, ss:

Date received by Administrative Unit
10/5/26
Stamp here

Willard Storage Battery Company

Type or print. (Name of taxpayer or purchaser of stamps.)
246 East 131st Street, Cleveland, Ohio.
(Residence—give street and number as well as city or town and State.)
Same (business address).

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer
14 named, and that the facts given below with reference to said statement are true and complete:

Period — Year
From: January 1st, 1922
To: December 31st, 1922

1 Business in which engaged manufacture of electric storage batteries.
2. Character of assessment or tax manufacturers' excise tax on batteries.
(State for or upon what the tax was assessed or the stamps affixed.)
3. Amount of assessment $295,344.49
4. Reduction of tax liability requested, income and profits tax .. $.....
5. Amount to be abated ..... $.....
6. Amount to be refunded (or such greater amount as is legally refundable) $295,344.49
7. Dates of payment (see collector's receipts or indorsements of canceled checks) .....
(If statement covers income-tax liability, items 8–11, inclusive, must be answered.)
8. District in which return (if any) was filed—Cleveland, Ohio.
9. District in which unpaid assessment appears .....
10. Amount of overpayment claimed as credit ..... $.....
11. Unpaid assessment against which credit is asked; period from ..... to ..... $.....

Deponent verily believes that this application should be allowed for the following reasons:

Our returns have been filed monthly and the tax paid as required by regulations. As there is only one question involved, we are filing this claim for refund by calendar years to cover twelve monthly

payments in order to cut the records and correspondence to a minimum.

Our request for refund is based upon the fact that storage batteries were in use before the automobile came into existence, that they are used in connection with all kinds of internal-combustion engines, marine, stationary, and portable. While they are used very extensively in automobiles, the same storage batteries are used in
15 motor boats, aeroplanes, farm tractors, road graders, railway locomotive engines, thrashing engines, concrete mixers, water pumps, hoisting machines, electric door bells, radios, laboratory work, and in various other situations when small electric power is required.

In view of the above facts we claim that the collection of the manufacturers' excise tax imposed by Regulations No. 47, under the Revenue Acts of 1918, 1921, and 1924, was a tax illegally collected and as such should be refunded.

(Attach additional sheets if necessary.)

(Signed) F. S. STILES.

Sworn to and subscribed before me this 22nd day of September 1926.

E. L. PETERS,
(Title) *Notary Public.*

(This affidavit may be sworn to before a deputy of internal revenue or revenue agent without charge.)

Exhibit "E" to petition

Amended claim

(Execute separate form for each tax period)

Treasury Department
Internal Revenue Service
Form 843—Jan. 1922
Comptroller General U.S.
January 18, 1922

Collector's notation
District
Account number
Date received
Stamp here
Collector of internal revenue

Claim for

Abatement of tax assessed.
Credit against outstanding assessments.
× Refund of taxes illegally collected.
Refund of amounts paid for stamps used in error or excess.

Important

File with collector of internal revenue where assessment was made. Not acceptable unless completely filled in.

Notice to collector

Collector must indicate in block above the kind of claim, except in income tax case.

16 State of Ohio,
County of Cuyahoga, ss:

Date received by Administrative unit
Stamp here

Willard Storage Battery Company

Type or print (Name of taxpayer or purchaser of stamps).
246 East 131st Street, Cleveland, Ohio.
(Residence—give street and number as well as city or town and State).
Same (business address).

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

Period Year
From: January 1st 1922.
To: December 31st 1922.

1. Business in which engaged. Manufacture of electric storage batteries.
2. Character of assessment or tax _____
(State for or upon what the tax was assessed or the stamps affixed.)
3. Amount of assessment _____ $295,049.71
4. Reduction of tax liability requested (income and profits tax) _____ $_____
5. Amount to be abated _____ $_____
6. Amount to be refunded (or such greater amount as is legally refundable) _____ $295,049.71
7. Dates of payment (see collector's receipts or indorsements of canceled checks) _____
(If statement covers income-tax liability, items 8–11, inclusive, must be answered.)
8. District in which return (if any) was filed _____
9. District in which unpaid assessment appears _____
10. Amount of overpayment claimed as credit _____ $_____
11. Unpaid assessment against which credit is asked; period from _____ to _____ $_____

Deponent verily believes that this application should be allowed for the following reasons:

17 This is an amended claim based on the period in which tax was actually paid. Original claim filed October 5th, 1926, was based on period when tax was due.

(Attach additional sheets if necessary.)

(Signed) F. S. STILES.

Sworn to and subscribed before me this 28th day of October, 1926.

_____ _____ _____
(Title)

(This affidavit may be sworn to before a deputy of internal revenue or revenue agent without charge.)

Exhibit "F" to petition

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, June 21, 1927.

Address reply to Commissioner of Internal Revenue, and refer to MT:M:WED. C-1-S-700.

WILLARD STORAGE BATTERY COMPANY,
246 East 131st Street, Cleveland, Ohio.

GENTLEMEN: Reference is made to your claim for refund of $295,049.71 paid as manufacturer's excise tax on automobile parts and accessories.

You were requested to advise within 30 days whether you intended to comply with Treasury Decision 4015 in the prosecution of your claim.

This office is in receipt of your letter dated June 10, 1927, from which it appears that you do not intend to prosecute the matter further along the lines suggested. Your claim is accordingly thereby rejected for lack of evidence.

Respectfully,

C. R. NASH, *Acting Commissioner.*

EM

18 In United States District Court

Defendant's motion to dismiss

Filed July 8, 1929, in no. 15761

Now comes Wilfred J. Mahon, United States attorney for the northern district of Ohio, on behalf of the defendant herein, and by leave of court first obtained, moves to dismiss the above-entitled cause upon the grounds and reasons therefor as follows:

1. Because the provisions of section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of refund of manufacturer's excise taxes collected under the provisions of section 9000 (3) of the Revenue Act of 1921 and section 600 (3) of the Revenue Act of 1924 in an action instituted subsequent to April 30, 1928.

2. Because the provisions of section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of instituting and maintaining an action, subsequent to May 29, 1928, effective date of the act, for the recovery of manufacturer's excise tax paid under the provisions of section 900 (3) of the Revenue Act of 1921 and section 600 (3) of the Revenue Act of 1924.

3. Because this court is without jurisdiction to review the discretionary power vested in the Commissioner of Internal Revenue by the provisions of section 424 of the Revenue Act of 1928.

4. Because the provisions of section 424 of the Revenue Act of 1928 provide an exclusive remedy.

W. J. MAHON,
United States Attorney.

The plaintiff will take notice that the defendant has filed a motion to dismiss in the above-entitled case; that such motion will be on for hearing at such time as the court shall designate.

W. J. MAHON.

Received service of the above motion and notice this 8th day of June, 1929.

CHARLES C. NORRIS, JR.,
F. C. FRIEND,
Attys. for Plff.

19 In United States District Court

Order overruling defendant's motion to dismiss

Entered Dec. 16, 1929, in nos. 15761, 15762, 15763, 15764, 15765, by West, judge

These causes have been submitted to the court on a previous day of this term on the motions of defendant to dismiss, on consideration thereof the court overruled said motions to which ruling of the court defendant by his attorney excepts.

In United States District Court

Defendant's exception to order overruling motion to dismiss

Filed December 18, 1929, in nos. 15761, 15762, 15763, 15764, 15765

Now comes the defendant C. F. Routzahn, collector of internal revenue, 18th District of Ohio, and excepts to the ruling of the court on the motion to dismiss the above entitled and above numbered actions at law, in which ruling the court overruled said defendant's motion to dismiss.

W. J. MAHON,
United States Attorney.

20 In United States District Court

Defendant's answer

Filed April 12, 1930, in no. 15761

Now comes Wilfred J. Mahon, United States attorney for the Northern District of Ohio, on behalf of the defendant herein, by

leave of court first obtained, and for answer to plaintiff's petition admits the corporate capacity of the plaintiff herein; admits that defendant is the duly appointed, qualified, and acting collector of internal revenue of the United States for the Eighteenth District of Ohio, and that the city of Cleveland is located in said district.

Defendant admits that prior to September 1, 1922, and from that date continuously to the present time, plaintiff has been and now is engaged in the manufacture and sale of electric storage batteries in the city of Cleveland, Ohio; that in each calendar month during the period beginning on September 1, 1922, and ending on December 31, 1922, plaintiff made sales of electric storage batteries and on or about the last day of the calendar month then immediately succeeding each of the said months in which the said sales were made, plaintiff made a return in accordance with the provisions of title 9 of section 900 of the Revenue Act of 1921 of the computation of manufacturers excise taxes at the rate of 5% of the selling prices of the said electric storage batteries upon the sales thereof made by the plaintiff in each immediately preceding calendar month; that the amount of the said manufacturers excise tax was set forth in each of the said returns in a single sum and represented the computation of 5% upon the selling price of the said electric storage batteries which had been sold by the plaintiff during the then preceding calendar month; that exhibit A attached to plaintiff's petition is a true copy of a return made for the month of September 1922, made by plaintiff to defendant; that exhibit B attached to plaintiff's petition sets forth the dates and amounts of money paid by plaintiff to defendant as manufacturers excise tax upon the selling price of electric storage batteries which were manufactured by plaintiff and sold by plaintiff during the respective calendar month set forth thereon; that said payments of taxes were made contemporaneously with and in accordance with the computation of the said excise taxes as set forth in the returns made by plaintiff.

21 Defendant denies that the electric storage batteries upon the selling prices of which the said taxes were paid by the plaintiff, were commercial commodities and defendant denies that said electric storage batteries were not specifically designed and not primarily adaptable only for use on or in connection with automobile trucks, automobile wagons and other automobiles or motorcycles, and were interchangeable for use in stationary and portable engines extensively in many other industries than the automobile truck, automobile wagon, other automobile and motorcycle industries.

Defendant denies all of the allegations contained in paragraphs 6, 7, 8, and 9 of plaintiff's petition.

Defendant admits that exhibit C, attached to plaintiff's petition, is a true and correct copy of the original receipts executed by defendant for the taxes paid in each calendar month by the plaintiff to and upon the demand of the defendant representing the payment of the taxes by plaintiff.

Defendant denies the allegations contained in paragraph 11 of plaintiff's petition.

Defendant admits that on or about October 5, 1926, plaintiff filed with the Commissioner of Internal Revenue a claim for refund of taxes collected by defendant from plaintiff during the period beginning January 1, 1922, and ending December 31, 1922, a true copy of which claim for refund is attached to plaintiff's petition and marked "Exhibit D."

Defendant denies that on November 3, 1926, plaintiff filed with the Commissioner of Internal Revenue an amended claim for refund of taxes paid during said period, but says that said amended claim for refund was filed October 29, 1926, with the Commissioner of Internal Revenue; a true copy of said amended claim for refund is attached to plaintiff's petition marked "Exhibit E" and made a part thereof.

Defendant admits that said claims for refund were duly rejected by the Commissioner of Internal Revenue on June 24, 1927; defendant denies that there is due plaintiff from defendant the sum of $89,195.30 or any sum whatsoever by reason of payment of manufacturers excise taxes by plaintiff in the premises.

Defendant further says that under the provisions of section 424 of the Revenue Act of 1928, plaintiff is deprived of the right 22 of refund of manufacturer's excise taxes collected under the provisions of section 900 (3) of the Revenue Act of 1921 and section 600 (3) of the Revenue Act of 1924 in any action instituted subsequent to April 30, 1928, or in any action instituted subsequent to May 29, 1928; that the provisions of section 424 of the Revenue Act of 1928 vest a discretionary power in the Commissioner of Internal Revenue which this court is without jurisdiction to review; that the provisions of section 424 of the Revenue Act of 1928 provide an exclusive remedy within the Treasury Department of the United States.

Wherefore, defendant prays that plaintiff's petition be dismissed and that it be allowed to go hence with its costs.

WILFRED J. MAHON,
United States Attorney.

[*Duly sworn to by Wilfred J. Mahon, jurat, omitted in printing.*]

23 In United States District Court

Jury waived; trial in progress; portion of plaintiff's testimony adduced; adjournment to May 15, 1931

Entered May 14, 1931, in no. 15761, by West, Judge

This day came the parties by their attorneys and a jury having been waived, this cause came on to be heard by the court on the pleadings and the evidence, and the court having heard a part of the testimony adduced on behalf of the plaintiff, and the hour for

adjournment having arrived, the further trial of this cause was postponed until tomorrow morning at 9:30 o'clock.

In United States District Court

Trial on progress; plaintiff's testimony concluded; defendant's testimony concluded; cause taken under advisement by the court

Entered May 15, 1931, in no. 15761, by West, Judge

This day again came the parties by their attorneys and a jury having been waived, this cause came on to be heard by the court on the pleadings and the evidence, and the court having heard all of the testimony adduced on behalf of the parties, took the cause under advisement.

21 In United States District Court

Stipulation of facts

Filed May 14, 1931, in no. 15761

It is hereby stipulated by and between the parties hereto, by their respective attorneys, that the following facts shall be taken as true; provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true.

1. The Willard Storage Battery Company during the times hereinafter mentioned was and now is a corporation organized, existing, and operating under and by virtue of the laws of the State of West Virginia, with its principal place of business located at Cleveland, Ohio.

2. The defendant, C. F. Routzahn, during the times hereinafter mentioned was and now is the duly appointed, qualified, and acting collector of internal revenue for the Eighteenth District of Ohio.

3. During the times hereinafter mentioned plaintiff was engaged in the business of manufacturing and selling electric storage batteries.

4. Plaintiff and all the officers thereof have at all times borne true allegiance to the United States of America and have not, nor have any of them in any way voluntarily aided, abetted, or given encouragement to rebellion against the United States and plaintiff is a citizen of the United States, the sole owner of the claim hereinafter stated, no action has been had thereon before Congress or any governmental department except as hereinafter stated, and no part of which has ever been sold or assigned.

5. Plaintiff filed its manufacturer's excise tax returns monthly for the taxable periods September 1922 to November 1922, inclusive, showing the amount of tax due thereon which was duly assessed on

such returns by the Commissioner of Internal Revenue, paid by plaintiff, for the months, in the amounts, and on the dates hereafter set forth as follows:

Period	Year	Month	Year	Page	Line	Amount	Date paid
Sept	1922	Oct	1922	50	1	$34,731.30	10/31/22
Oct	"	Nov	"	46	7	31,097.01	11/29/22
Nov	"	Dec	"	57	2	23,367.05	12/30/22

25 6. On October 5, 1926, plaintiff filed its claim for refund #21169 of manufacturer's excise tax paid on electric storage batteries for the taxable periods January 1922 to December 1922, inclusive, in the amount of $295,344.49 which was duly rejected by the Commissioner of Internal Revenue on June 25, 1929.

7. On October 29, 1926, plaintiff filed its amended claim for refund #700 of manufacturer's excise tax so paid on electric storage batteries for the taxable periods January 1922 to November 1922, inclusive, in the amount of $295,049.71, which was duly rejected by the Commissioner of Internal Revenue on June 21, 1927.

8. Duly certified photostat copies of returns, claims for refund, claims for credit, claims for abatement, waivers, assessments, reports, letters and other departmental records pertinent to the issues in this case shall be admitted and received in evidence the same as if the originals thereof were properly identified and admitted, subject only to the right of either party to object because of their irrelevancy or immateriality.

WILLARD STORAGE BATTERY COMPANY,
By CHARLES C. NORRIS, JR.
Attorney for Plaintiff.

C. F. ROUTZAHN, *Collector*,
By W. J. MAHON,
U. S. Attorney for Defendant.
By JOHN B. OSMUN,
Asst. U. S. Atty.

E. F. MCMAHON,
Special Atty.

26 In United States District Court

Waiver of Jury

Filed March 9, 1931, in no. 15761

We, the attorneys for the respective parties, hereby waive the trial to the jury of this cause, and agree to submit the same to the court without the intervention of a jury.

TOLLES, HOGSETT & GINN,
Attorneys for Plaintiff.
WILFRED J. MAHON,
Attorney for Defendant.

In United States District Court

Order consolidating case no. 15761 law with cases nos. 15762-3-4-5—law for trial only

Entered May 14, 1931, in no. 15761, by West, Judge

It is ordered that this case be consolidated with cases nos. 15762, 15763, 15764, and 15765 law for trial only.

27

In United States District Court

Plaintiff's request for findings of fact and conclusions of law

Filed May 15, 1931, in nos. 15761, 15762, 15763, 15764, 15765

Plaintiff respectfully requests that the court make the following: (1) Finding of fact and (b) conclusions of law:

A—FINDINGS OF FACT

1. The Willard Storage Battery Company during the times hereinafter mentioned was and now is a corporation organized, existing and operating under and by virtue of the laws of the State of West Virginia with its principal place of business located at Cleveland, Ohio.

2. The defendant, C. F. Routazhn, during the times hereinafter mentioned was and now is the duly appointed, qualified, and acting collector of internal revenue for the eighteenth district of Ohio.

3. During the period from September 1, 1922, to and including April 1, 1926, plaintiff was engaged in the business of manufacturing and selling electric storage batteries.

4. Plaintiff filed its manufacturer's excise tax returns monthly for the taxable periods from September 1922 to February 1926, inclusive, showing the amount of tax due thereon which was duly assessed on such returns by the Commissioner of Internal Revenue, paid by plaintiff, for the months, in the amounts, and on the dates hereinafter set forth as follows:

Period	Year	Month	Year	Amount	Date paid
Sept	1922	Oct	1922	$34,731.30	10/31/22
Oct	"	Nov	"	31,097.01	11/29/22
Nov	"	Dec	"	23,367.05	12/30/22
Dec	"	Jan	1923	22,486.39	1/30/23
Jan	1923	Feb	"	15,076.44	2/29/23
Feb	"	Mar	"	22,133.63	3/30/23
Mar	"	Apr	"	31,792.23	4/27/23
Apr	"	May	"	25,920.09	5/31/23
May	"	June	"	14,657.74	6/30/23
June	"	July	"	15,790.62	7/31/23
28 July	"	Aug	"	12,705.08	8/30/23
Aug	"	Sept	"	22,826.28	9/29/23
Sept	"	Oct	"	17,912.98	10/31/23
Oct	"	Nov	"	26,236.87	11/30/23
Nov	"	Dec	"	21,736.97	12/29/23

Period	Year	Month	Year	Amount	Date paid
Dec	1923	Jan	1924	$16,258.35	1/31/24
Jan	1924	Feb	"	21,221.02	2/29/24
Feb	"	Mar	"	24,783.60	3/29/24
Mar	"	Apr	"	27,383.15	4/30/24
Apr	"	May	"	16,773.84	5/29/24
May	"	June	"	12,834.43	6/28/24
June	"	July	"	11,828.40	7/30/24
July	"	Aug	"	7,736.48	8/30/24
Aug	"	Sept	"	10,577.00	9/30/24
Sept	"	Oct	"	12,768.27	10/31/24
Oct	"	Nov	"	14,910.29	11/29/24
Nov	"	Dec	"	12,779.05	12/31/24
Dec	"	Jan	1925	14,852.63	1/30/25
Jan	1925	Feb	"	8,363.97	2/28/25
Feb	"	Mar	"	11,588.18	3/31/25
Mar	"	Apr	"	12,923.08	4/30/25
Apr	"	May	"	6,639.61	5/29/25
May	"	June	"	6,635.54	6/30/25
June	"	July	"	7,861.95	7/31/25
July	"	Aug	"	15,760.86	8/31/25
Aug	"	Sept	"	18,811.15	9/30/25
Sept	"	Oct	"	22,705.71	10/31/25
Oct	"	Dec	"	26,802.53	12/1/25
Nov	"	Dec	"	21,989.24	12/31/25
Dec	"	Jan	1926	16,793.37	1/29/26
Jan	1926	Feb	"	14,515.68	2/26/26
Feb	"	Apr	"	10,455.52	4/1/26

5. On October 5, 1926, plaintiff filed its claims for refund of manufacturers' excise tax paid on electric storage batteries for each year during the taxable periods from January 1922 to February 1926, inclusive, in the amounts of $295,344.49, $243,047.28, $188,448.16, $175,875.19, and $24,971.20, respectively, which were duly rejected by the Commissioner of Internal Revenue on June 25, 1929.

6. On October 29, 1926, plaintiff filed its amended claims for refund no. 700, no. 701, no. 702, no. 703, no. 704, of manufacturer's excise tax so paid on electric storage batteries for each year
29 during the taxable periods from January 1922 to February 1926, inclusive, in the amounts of $295,049.71, $249,275.32, $189,853.88, $173,934.45, and $41,764.37, respectively, which were duly rejected by the Commissioner of Internal Revenue on June 21, 1927.

7. That the plaintiff, the Willard Storage Battery Company, was incorporated in 1902 and at that time took over the business of manufacturing Willard storage batteries which had been begun in 1895 or 1896 by the Willard Electric and Battery Company under the supervision of Mr. T. A. Willard and which had later been carried on by the partnership of Sipe & Sigler.

8. That payment of the excise taxes in suit was made under duress and after protest by the plaintiff against its collection.

9. That none of the storage batteries upon the sales of which the taxes in suit were paid were sold to manufacturers of automobiles, but practically all of them were sold by the plaintiff to jobbers, distributors, and storage battery and electrical service dealers, and the plaintiff does not know, nor can it ascertain, the uses to which the said storage batteries so sold by it were put.

10. That storage batteries, prior to their use on automobiles, were commercial commodities widely, generally, and commonly sold for a great many different uses.

11. That the first storage batteries which were purchased for use on automobiles were the same in all essential respects as the batteries which had been commonly and widely used for a number of years for a great many other purposes.

12. That the automobile manufacturer adjusted the space in the automobile to fit the storage battery and the storage battery was in no way designed or developed specially for use on the automobile.

13. That the parts of the electric storage batteries upon which the taxes in suit were paid were exactly the same as the parts of the storage batteries manufactured by the predecessors of the plaintiff in 1895 or 1899, and the only changes in the parts themselves are the changes naturally due to the refinement in art of manufacture developed during that period and to competition in price. None of these refinements made the batteries peculiarly adaptable for use only on automobiles, but they continued to be equally adaptable for use on any device where the duty requirements were the same.

14. That the storage batteries manufactured by the plaintiff and upon which the taxes in suit were paid were commercial commodities which were commonly, generally, and widely manufactured and sold for a great many different purposes. There was no peculiar characteristic of these batteries which rendered them not such a commercial article as would ordinarily be sold for general use for a great many different purposes.

15. That the uses of electric storage batteries manufactured by the plaintiff and upon which the taxes were paid, other than the use on automobiles, were not incidental to the use on automobiles.

16. That the storage batteries manufactured by the plaintiff, and upon which the taxes in suit were paid, were not peculiarly adaptable only for automobiles, but were equally well adaptable for use in stationary engines, marine engines, tractors, radio, and for a great many other purposes where the duty required was the same, and were so used.

17. That the storage batteries manufactured by the plaintiff, and upon which the taxes in suit were paid were not primarily adaptable for use only on automobiles.

18. That the storage batteries manufactured by the plaintiff, and upon which the taxes in suit were paid, were interchangeable for use in connection with automobiles or for use in connection with a great many other devices where the duty requirements were the same.

19. That the storage batteries manufactured by the plaintiff, and upon which the taxes in suit were paid, were not designed for the special purpose of being used on automobile trucks, automobile wagons, or other automobiles, but were designed for use also for innumerable uses in every field in which electricity in portable form was required. Their size, shape, and design depended entirely upon the duty required of them, and that duty consisted only of the voltage, the discharge rate of the current, the capacity, and the

31 life of the battery. The duty required for use in automobiles was also required in innumerable other uses and the batteries which were applied to these uses were identical in design with the batteries used in connection with automobiles.

20. That the storage batteries manufactured by the plaintiff, and upon which the taxes in suit were paid, were just as applicable for one use as for another where the duty required was the same.

B—CONCLUSIONS OF LAW.

1. The articles upon the sale of which the taxes in the foregoing actions, to wit, nos. 15761, 15762, 15763, 15764, and 15765, were collected are not parts or accessories for any of the articles mentioned in subdivisions (1) and (2) of sec. 900, tit. IX, of the Revenue Act of 1921, or sec. 600, tit. VI, of the Revenue Act of 1924.

2. The taxes in the above actions were illegally assessed and collected. The plaintiff is entitled to judgment in suit no. 15761 in the amount of $134,539.38, together with interest at the rate of 6% per annum on the sum of $89,195.36 from May 15, 1931, to ;

Plaintiff is entitled to judgment in suit no. 15762 in the amount of $366,548.79, together with interest at the rate of 6% per annum on the sum of $249,275.32 from May 15, 1931, to ;

Plaintiff is entitled to judgment in suit no. 15763 in the amount of $268,470.53, together with interest at the rate of 6% per annum on the sum of $189,853.88 from May 15, 1931, to ;

Plaintiff is entitled to judgment in suit no. 15764 in the amount of $233,876.28, together with interest at the rate of 6% per annum on the sum of $173,934.45 from May 15, 1931, to ;

Plaintiff is entitled to judgment in suit no. 15765 in the amount of $54,861.69, together with interest at the rate of 6% per annum on the sum of $41,764.57 from May 15, 1931, to .

Respectfully submitted.

CHARLES C. NORRIS, JR.,
TOLLES, HOGSETT & GINN,
Attorneys for Plaintiff.

32 In United States District Court

Defendant's request for findings of fact and conclusions of law

Filed May 15, 1931, in nos. 15761, 15762, 15763, 15764, 15765

Now comes the defendant by his attorney, Wilfred J. Mahon, United States attorney for the northern district of Ohio, and requests the court to find from the evidence adduced at the trial of these cases, each of the following findings of fact in each of the above cases:

1. The use to which an electric storage battery is to be placed determines its design.

2. Plaintiff has failed to show the specific design of electric storage battery required for each of the uses to which its electric storage batteries were used or placed during each of years 1895 to 1926, inclusive.

3. Plaintiff has failed to show the specific duty requirements of each of the uses to which its electric storage batteries were used or placed during each of the years 1895 to 1926, inclusive.

4. Plaintiff has failed to show the specific design of electric storage battery required for each of the uses, other than on or in connection with automobile trucks, automobile wagons, other automobiles, etc., to which its batteries were placed or used during the taxable periods September 1922 to February 1926, inclusive.

5. Plaintiff has failed to show the specific duty requirements of each of the uses, other than on or in connection with automobile trucks, automobile wagons, other automobiles, etc., to which its electric storage batteries were used or placed during the taxable periods September 1922 to February 1926, inclusive.

6. Plaintiff has failed to show the specific design of electric storage battery required for each of the uses, other than on or in connection with automobile trucks, other automobiles, etc., to which its batteries were placed or used during each of the years 1895 to 1926, inclusive, were of the same design required for use on or in connection with automobile trucks, other automobiles, etc., during each of the years 1908 to 1926, inclusive.

33 7. Plaintiff has failed to show the specific duty requirements of each of the uses, other than on or in connection with automobile trucks, other automobiles, etc., to which its electric storage batteries were placed or used during each of the years 1895 to 1926, inclusive, were the same as the duty requirements of the use on or in connection with automobile trucks, other automobiles, etc., during each of the years 1908 to 1926, inclusive.

8. Plaintiff has failed to show the specific number of each size and type of electric storage battery manufactured and sold by it for each use to which its batteries were placed or used, other than on or in connection with automobile trucks, other automobiles, etc., during the taxable periods September 1922 to February 1926, inclusive.

9. Plaintiff had failed to show the specific number of each size and type of electric storage battery manufactured and sold by it and upon the sale of which the taxes in question were imposed, which it manufactured and sold for other uses than on or in connection with automobile trucks, other automobiles, etc., during the taxable periods September 1922 to February 1926, inclusive.

10. Plaintiff has failed to show that each specific size and type of its electric storage batteries, upon the manufacture and sale of which the tax was paid for the taxable periods in question, was not primarily designed for use on or in connection with automobile trucks, automobile wagons, other automobiles, and motorcycles.

11. Plaintiff has failed to show each specific size and type of its electric storage batteries, upon the manufacture and sale of which the tax was paid for the taxable periods in question, was not primarily adapted for use on or in connection with automobile trucks, automobile wagons, other automobiles, and motorcycles.

12. Plaintiff advertised to the public during the taxable periods in question that numerous designated manufacturers of automobiles and automobile trucks were then using its batteries as original equipment in automobiles and automobile trucks manufactured and sold by such manufacturers.

34 13. Plaintiff advertised to its trade, other than manufacturers of automobile trucks and other automobiles, in bulletins and catalogues put out by it during each year of 1922 to 1926, that each of the specific sizes and types of its electric storage batteries, upon the manufacture and sale of which the tax in question was paid for the taxable periods September 1922 to February 1926, inclusive, was adapted for use as a replacement battery in some make of practically all makes of automobiles and automobile trucks then manufactured and in use.

14. The chief use or principal use to which batteries of the specific sizes and types, upon the manufacture and sale of which the tax in question was paid for the taxable periods September 1922 to February 1926, inclusive, was in automobile trucks and other automobiles.

15. The tax in question, which was paid for the taxable periods September 1922 to February 1926, inclusive, by plaintiff to the defendant, was passed on or collected by plaintiff, directly or indirectly, from its customers and the ultimate consumers.

16. All of the electric storage batteries manufactured and sold by plaintiff, upon which the tax in question was paid for the taxable periods involved, were primarily adapted for use in some make of automobile truck, automobile wagon, or other automobiles.

17. Plaintiff advertised to its trade, other than manufacturers of automobile trucks and automobiles, in bulletins put out by it during the taxable periods involved, that the prices quoted included Federal excise tax.

DEFENDANT'S REQUEST FOR CONCLUSIONS OF LAW

Now comes the defendant by his attorney, Wilfred J. Mahon, United States attorney for the northern district of Ohio, and requests the court to make each of the following conclusions of law in each of the above cases:

1. That the electric storage batteries manufactured and sold
35 by plaintiff during the taxable periods September 1922 to February 1926, inclusive, upon the sale of which the tax in question was imposed, were manufactured and sold as parts or accessories for automobile trucks, automobile wagons, and other automobiles within the meaning of the provisions of section 900 of the Revenue Act of 1921 and 600 of the Revenue Act in 1924.

2. That the defendant is entitled to judgment against plaintiff and in favor of defendant, dismissing plaintiff's petitions at plaintiff's costs.

3. That plaintiff is not entitled to judgment against defendant and in favor of plaintiff in any amount.

W. J. MAHON,
United States Attorney.
By JOHN B. OSMUN,
Asst. U.S. Atty.

In United States District Court

Stipulation re certain exhibits

Filed June 8, 1931, in nos. 15761, 15762, 15763, 15764, 15765

It is stipulated by and between the parties hereto that the following exhibits of plaintiff, to-wit, nos. 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 were duly offered and received in evidence at the trial hereof.

Dated June 5, 1931.

TOLLES, HOGSETT & GINN,
Attorneys for Plaintiff.
W. J. MAHON and JOHN B. OSMUN,
Attorneys for Defendant.

36 In United States District Court

Order overruling defendant's motion for judgment

Entered September 18, 1931, in nos. 15761, 15762, 15763, 15764, 15765, by West, Judge

This day these causes came on to be heard on the motion of defendant for judgment in favor of defendant and against plaintiff, dismissing plaintiff's petitions, and were submitted to the court; on consideration thereof the court denied said motion, to which ruling of the court defendant by his attorney, excepts.

In United States District Court

Defendant's exceptions to the Court's ruling denying and overruling defendant's motion for judgment

Filed Sep. 30, 1931, in nos. 15761, 15762, 15763, 15764, 15765

Now comes the defendant by his attorney, Wilfred J. Mahon, United States attorney for the northern district of Ohio, and excepts to the court's ruling denying and overruling the motion for judgment in favor of the defendant and against plaintiff and dismiss-

ing plaintiff's petitions on the grounds set forth in said motion for judgment, on the ground that said ruling is against the law and there is no evidence to support said ruling.

W. J. MAHON,
United States Attorney.

37 In United States District Court

Findings of fact and conclusions of law

Entered Oct. 26, 1931, in nos. 15761, 15762, 15763, 15764, 15765, by West, Judge

By agreement of counsel, these five cases were consolidated and tried together as one and a jury having been waived in each case by stipulation filed therein and the cases thus consolidated coming on to be heard upon the pleadings and the evidence and the arguments of counsel, and upon consideration thereof the court finds for the plaintiff and against the defendant in each of said cases, and now makes in each of said cases the following findings of fact and conclusions of law.

A—FINDINGS OF FACT

1. The Willard Storage Battery Company during the times hereinafter mentioned was and now is a corporation organized, existing, and operating under and by virtue of the laws of the State of West Virginia with its principal place of business located at Cleveland, Ohio.

2. The defendant, C. F. Routzahn, during the times hereinafter mentioned was and now is the duly appointed, qualified, and acting Collector of Internal Revenue for the eighteenth district of Ohio.

3. During the period from September 1, 1922, to and including April 1, 1926, plaintiff was engaged in the business of manufacturing and selling electric storage batteries.

4. Plaintiff filed its manufacturer's excise tax returns monthly for the taxable periods from September 1922 to February 1926, inclusive, showing the amount of tax due thereon which was duly assessed on such returns by the Commissioner of Internal Revenue, paid by plaintiff, for the months, in the amounts, and on the dates hereinafter set forth, as follows:

Period	Year	Month	Year	Amount	Date paid
Sept.	1922	Oct.	1922	$34,731.30	10/31/22
Oct.	"	Nov.	"	31,097.01	11/29/22
Nov.	"	Dec.	"	23,367.05	12/30/22
Dec.	"	Jan.	1923	22,486.39	1/30/23
Jan.	1923	Feb.	"	15,076.44	2/29/23
Feb.	"	Mar.	"	22,133.63	3/30/23
38 Mar.	"	Apr.	"	31,792.23	4/27/23
Apr.	"	May	"	25,920.09	5/31/23
May	"	June	"	14,657.74	6/30/23

Period	Year	Month	Year	Amount	Date paid
June	1923	July	1923	$15,790.62	7/31/23
July	"	Aug	"	12,705.08	8/30/23
Aug	"	Sept	"	22,826.28	9/29/23
Sept	"	Oct	"	17,912.98	10/31/23
Oct	"	Nov	"	26,230.87	11/30/23
Nov	"	Dec	"	21,736.97	12/29/23
Dec	"	Jan	1924	16,258.35	1/31/24
Jan	1924	Feb	"	21,221.02	2/29/24
Feb	"	Mar	"	24,783.60	3/29/24
Mar	"	Apr	"	27,383.15	4/30/24
Apr	"	May	"	16,773.84	5/29/24
May	"	June	"	12,834.43	6/28/24
June	"	July	"	11,828.40	7/30/24
July	"	Aug	"	7,736.48	8/30/24
Aug	"	Sept	"	10,577.00	9/30/24
Sept	"	Oct	"	12,768.27	10/31/24
Oct	"	Nov	"	14,910.29	11/29/24
Nov	"	Dec	"	12,779.05	12/31/24
Dec	"	Jan	1925	14,852.63	1/30/25
Jan	1925	Feb	"	8,353.97	2/28/25
Feb	"	Mar	"	11,588.18	3/31/25
Mar	"	Apr	"	11,923.08	4/30/25
Apr	"	May	"	6,639.61	5/29/25
May	"	June	"	6,635.54	6/30/25
June	"	July	"	7,861.95	7/31/25
July	"	Aug	"	15,780.86	8/31/25
August	"	Sept	"	18,811.15	9/30/25
Sept	"	Oct	"	22,705.71	10/31/25
Oct	"	Dec	"	26,802.53	12/1/25
Nov	"	Dec	"	21,989.24	12/31/25
Dec	"	Jan	1926	46,793.37	1/29/26
Jan	1926	Feb	"	14,515.68	2/26/26
Feb	"	Apr	"	10,455.52	4/1/26

5. On October 5, 1926, plaintiff filed its claims for refund of manufacturer's excise tax paid on electric storage batteries for each year during the taxable periods from January 1922 to February 1926, inclusive, in the amounts of $295,344.49, $243,047.28, $188,44[illegible].16, $175,875.19, and $24,971.20, respectively, which were duly rejected by the Commissioner of Internal Revenue on June 25, 1929.

39 6. On October 29, 1926, plaintiff filed its amended claims for refund no. 700, no. 701, no. 702, no. 703, and no. 704, of manufacturer's excise tax so paid on electric storage batteries for each year during the taxable periods from January 1922 to February 1926, inclusive, in the amounts of $295,049.71, $249,275.32, $189,853.88, $173,934.45, and $41,764.37, respectively, which were duly rejected by the Commissioner of Internal Revenue on June 21, 1927.

7. That the plaintiff, the Willard Storage Battery Company, was incorporated in 1902 and at that time took over the business of manufacturing Willard storage batteries which had been begun in 1895 or 1896 and was later carried on by the partnership of Sipe & Sigler.

8. That payment of the excise taxes in suit was made under duress and after protest by the plaintiff in May 1919 against the collection of prior similar taxes.

9. That none of the storage batteries upon the sales of which the taxes in suit were paid were sold to manufacturers of automobiles, but the majority of them were sold by the plaintiff to jobbers, distributors, and storage battery and electrical service dealers, and the

plaintiff does not know, nor can it ascertain, the uses to which the said storage batteries so sold by it were put.

10. That storage batteries, prior to their use on automobiles, were commercial commodities widely, generally, and commonly sold for many different uses.

11. That the first storage batteries which were purchased for use on automobiles were the same in all essential respects as the batteries which had been commonly and widely used for a number of years for many other purposes.

12. That the automobile manufacturer adjusted the space in the automobile to fit the storage battery and the storage battery was not designed specially for use on the automobile.

13. That the parts of the electric storage batteries upon which the taxes in suit were paid were much the same as the parts of the storage batteries manufactured by the predecessors of the plaintiff in 1895 or 1899, the only changes being those naturally due to the refinement in art of manufacture during that period and to competition in price. None of these refinements made the batteries peculiarly adaptable for use only on automobiles, but they continued to be equally adaptable for use on any device where the duty requirements were the same.

14. That the storage batteries manufactured by the plaintiff and upon which the taxes in suit were paid were commercial commodities which were commonly, generally, and widely manufactured and sold for a great many different purposes. There was no peculiar characteristic of these batteries which rendered them not such a commercial article as would ordinarily be sold for general use for a great many different purposes.

15. That the uses of said electric storage batteries, other than the use on automobiles, were not incidental to the use on automobiles.

16. That the storage batteries manufactured by the plaintiff, and upon which the taxes in suit were paid, were not peculiarly adaptable only for automobiles, but were equally well adaptable for use in stationary engines, marine engines, tractors, radio, and for a great many other purposes where the duty required was the same, and were so used. Nor were they primarily adaptable for use only on automobiles. They were interchangeable for use in connection with automobiles or for use in connection with a great many other devices where the duty requirements were the same.

17. That the storage batteries manufactured by the plaintiff, and upon which the taxes in suit were paid, were not designed for the special purpose of being used on automobile trucks, automobile wagons, or other automobiles, but were designed for use also for uses in other fields in which electricity in portable form was required. The duty required for use in automobiles was also required in various other uses and the batteries which were applied to these other uses

were identical in design with the batteries used in connection with automobiles. Said batteries were just as applicable for one use as for another where the duties required were the same.

41 B—CONCLUSIONS OF LAW

1. The articles upon the sale of which the taxes in the foregoing actions, to wit, nos. 15761, 15762, 15763, 15764, and 15765, were collected are not parts or accessories for any of the articles mentioned in subdivisions (1) and (2) of sec. 900, tit. IX, of the Revenue Act of 1921, or sec. 600, tit. VI, of the Revenue Act of 1924, and the said taxes were illegally assessed and collected.

2. In case no. 15761 the plaintiff is entitled to judgment for the amount of taxes illegally collected in the sum of $89,195.36, together with interest upon the amounts of taxes paid from the date of their respective payments at the rate of 6% per annum to a date set by the Commissioner of Internal Revenue of the United States, such date to be not more than thirty days earlier than that of the refund check.

3. In case no. 15762 the plaintiff is entitled to judgment for the amount of taxes illegally collected in the sum of $249,275.32, together with interest upon the amounts of taxes paid from the date of their respective payments at the rate of 6% per annum to a date set by the Commissioner of Internal Revenue of the United States, such date to be not more than thirty days earlier than that of the refund check.

4. In case no. 15763 the plaintiff is entitled to judgment for the amount of taxes illegally collected in the sum of $189,853.88, together with interest upon the amounts of taxes paid from the date of their respective payments at the rate of 6% per annum to a date set by the Commissioner of Internal Revenue of the United States, such date to be not more than thirty days earlier than that of the refund check.

5. In case no. 15764 the plaintiff is entitled to judgment for the amount of taxes illegally collected in the sum of $173,934.45, together with interest upon the amounts of taxes paid from the date of their respective payments at the rate of 6% per annum to a date set by the Commissioner of Internal Revenue of the United States, such date to be not more than thirty days earlier than that of the refund check.

42 6. In case no. 15765 the plaintiff is entitled to judgment for the amount of taxes illegally collected in the sum of $41,764.57, together with interest upon the amounts of taxes paid from the date of their respective payments at the rate of 6% per annum to a date set by the Commissioner of Internal Revenue of the United States, such date to be not more than thirty days earlier than that of the refund check.

In United States District Court

Order denying defendant's request for findings of fact and conclusions of law

Entered September 18, 1931, in nos. 15761, 15762, 15763, 15764, 15765, by S. H. West, judge

This day these causes came on to be heard on the defendant's request for findings of fact and conclusions of law; and were submitted to the court; on consideration thereof the court denied said request, to which ruling of the court defendant by his attorney, excepts.

43 In United States District Court

Defendant's exceptions to the refusal of the court to make findings of fact and conclusions of law as defendant requested

Filed Nov. 12, 1931, in nos. 15761, 15762, 15763, 15764, 15765

First. Defendant excepts to the refusal of the court to make the finding of fact as proposed by defendant numbered one.

Second. Defendant excepts to the refusal of the court to make the finding of fact as proposed by defendant numbered two.

Third. Defendant excepts to the refusal of the court to make the finding of fact as proposed by defendant numbered four.

Fourth. Defendant excepts to the refusal of the court to make the finding o fact as proposed by defendant numbered four.

Fifth. Defendant excepts to the refusal of the court to make the finding of fact as proposed by defendant numbered five.

Sixth. Defendant excepts to the refusal of the court to make the finding of fact as proposed by defendant numbered six.

Seventh. Defendant excepts to the refusal of the court to make the finding of fact as proposed by defendant numbered seven.

Eighth. Defendant excepts to the refusal of the court to make the finding of fact as proposed by defendant numbered eight.

Ninth. Defendant excepts to the refusal of the court to make the finding of fact as proposed by defendant numbered nine.

Tenth. Defendant excepts to the refusal of the court to make the finding of fact as proposed by defendant numbered ten.

Eleventh. Defendant excepts to the refusal of the court to make the finding of fact as proposed by defendant numbered eleven.

44 Twelfth. Defendant excepts to the refusal of the court to make the finding of fact as proposed by defendant numbered twelve.

Thirteenth. Defendant excepts to the refusal of the court to make the finding of fact as proposed by defendant numbered thirteen.

Fourteenth. Defendant excepts to the refusal of the court to make the finding of fact as proposed by defendant numbered fourteen.

Fifteenth. Defendant excepts to the refusal of the court to make the finding of fact as proposed by defendant numbered fifteen.

Sixteenth. Defendant excepts to the refusal of the court to make the finding of fact as proposed by defendant numbered sixteen.

Seventeenth. Defendant excepts to the refusal of the court to make the finding of fact as proposed by defendant numbered seventeen.

CONCLUSIONS OF LAW

First. Defendant excepts to the refusal of the court to announce conclusion of law as proposed by defendant numbered one.

Second. Defendant excepts to the refusal of the court to announce conclusion of law as proposed by defendant numbered two.

Third. Defendant excepts to the refusal of the court to announce conclusion of law as proposed by defendant numbered three.

W. J. MAHON,
United States Attorney.

Copy served by mail.

45 In United States District Court

Defendant's exceptions to findings of fact and conclusions of law

Filed Oct. 26, 1931, in nos. 15761, 15762, 15763, 15764, 15765

1. Defendant excepts to the court's finding of fact contained in paragraph 8 of the court's findings of fact, which reads as follows:

"That payment of the excise taxes in suit was made under duress and after protest by the plaintiff in May 1919 against collection of prior, similar taxes."

in that there is no evidence to support such finding and plaintiff admits no protest, either oral or written, was ever made to or filed with the collector of internal revenue for the eighteenth collection district of Ohio prior to or at the time the taxes in question were paid to the collector.

2. Defendant excepts to the court's finding of fact contained in paragraph 10 of the court's findings of fact, which reads as follows:

"That storage batteries, prior to their use on automobiles, were commercial commodities widely, generally, and commonly sold for many different uses."

in that there is no evidence to support such finding; that such finding assumes all electric storage batteries manufactured prior to their use on automobiles, etc., were of the same design, size, type, cell construction, cell assembly, shape, and construction as those subsequently used on automobiles.

3. Defendant excepts to the court's finding of fact contained in paragraph 11 of the court's findings of fact, which reads as follows:

"That the first storage batteries which were purchased for use on automobiles were the same in all essential respects as the batteries which had been commonly and widely used for a number of years for many other purposes."

in that there is no evidence to support such finding; that such finding assumes all batteries to have been of the same design, character, size, type, and construction as the batteries first sold for use on automobiles, etc., and such finding assume the duty requirement of all uses to have been the same, and such finding assumes that there has been no change in the design and construction of electric storage batteries since the advent of the automobile.

46

4. Defendant excepts to the court's finding of fact contained in paragraph 12 of the court's findings of fact, which reads as follows:

"That the automobile manufacturer adjusted the space in the automobile to fit the storage battery and the storage battery was not designed especially for use on the automobile."

in that there is no evidence to support such finding and such finding assumes the duty requirements of a storage battery for use in an automobile to be the same as the duty requirements necessary in all other uses, and such finding assumes that automobiles were built and designed around and to fit a storage battery, and such finding assumes that the use to which a storage battery is to be placed, does not determine the design of such battery.

5. Defendant excepts to the court's finding of fact contained in paragraph 13 of the court's findings of fact, which reads as follows:

"That the parts of the electric storage batteries upon which the taxes in suit were paid were much the same as the parts of the storage batteries manufactured by the predecessors of the plaintiff in 1895 or 1899, the only changes being those naturally due to the refinement in art of manufacture during that period and to competition in price. None of these refinements made the batteries peculiarly adaptable for use only on automobiles, but they continued to be equally adaptable for use on any device where the duty requirements were the same."

in that there is no evidence to support such finding and such finding assumes no changes were made in the container, vents, size, shape, plate area, connection, arrangement, cells, cell construction, and design of electric storage batteries subsequent to the advent of the automobile as compared with the batteries manufactured by plaintiff's predecessors in 1895 or 1899, and that such finding assumes that the use to which a battery is to be placed, is not determinative of the design of such battery and such finding assumes equal numbers of batteries to have been sold for use in connection with automobiles.

47

6. Defendant excepts to the court's finding of fact contained in paragraph 14 o fthe court's findings of fact which reads as follows:

"That the storage batteries manufactured by the plaintiff and upon which the taxes in suit were paid were commercial commodities which were commonly, generally, and widely manufactured and sold

for a great many different purposes. There was no peculiar characteristic of these batteries which rendered them into such a commercial article as would ordinarily be sold for general use for a great many different purposes",

in that there is no evidence to support such finding and such finding assumes all other uses require an electric storage battery of the same size, type, shape, cell arrangement, plate area, portable characteristics, construction, and design as is required for use on automobiles, etc., and such finding assumes the duty requirements of such other uses to be the same as the duty requirements of a battery for use on automobiles, etc., and such finding assumes no batteries were designed or manufactured for a given, specific use such as radio use, etc.

7. Defendant excepts to the court's finding of fact contained in paragraph 15 of the court's findings of fact which reads as follows:

"That the uses of said electric storage batteries other than the use on automobiles were not incidental to the use of the automobiles",

in that there is no evidence to support such finding and plaintiff admits the predominant and chief use of the sizes of batteries upon which the tax was imposed to have been on automobiles, automobile trucks, and automobile wagons.

8. Defendant excepts to the court's finding of fact contained in paragraph 16 of the court's findings of fact which reads as follows:

48 "That the storage batteries manufactured by the plaintiff and upon which the taxes in suit were paid, were not peculiarly adaptable only for automobiles, but were equally well adapted for use in stationary engines, marine engines, tractors, radios, and for a great many other purposes where the duty required was the same and were so used. Nor were they primarily adaptable for use only on automobiles. They were interchangeable for use in connection with automobiles or for use in connection with a great many other devices where the duty requirements were the same",

in that there is no evidence to support such finding and such finding assumes that the duty requirements of stationary engines, marine engines, tractors, and radios require a battery of the same design, size, shape, cell arrangement, plate area, plate thickness, type, and construction as is required in batteries for use on automobiles, etc., and such finding assumes that all other devices or uses possess the same duty requirements as is required of a battery for use in automobiles, etc., and such finding assumes that the delivery of electric current constitutes performances of the duty requirements necessary and required of a battery for use in an automobile regardless of the design and lasting qualities of such battery.

9. Defendant excepts to the court's finding of fact contained in paragraph 17 of the court's findings of fact which reads as follows:

"That the storage batteries manufactured by the plaintiff, and upon which the taxes in suit were paid, were not designed for the

special purpose of being used on automobile trucks, automobile wagons, or other automobiles, but were designed also for uses in other fields in which electricity in portable form was required. The duty required for use in automobiles was also required in various other uses and batteries which were applied to these other uses were identical in design with the batteries used in connection with automobiles. Said batteries were just as applicable for one use as for another where the duty requirements were the same",

49 in that there is no evidence to support such finding and such finding assumes that the duty requirements of various other uses are the same as the duty requirements of automobiles, etc., and such finding assumes that the supplying of electric current for a given purpose is the same as the performance of the duty requirements necessary in the use of a battery on automobiles and such finding assumes that the duty requirements of the other uses are the same as the duty requirements of batteries for use in automobiles and such finding assumes that all batteries are of the same size, shape, type, plate area, plate thickness, cell arrangement, and design as is required of batteries for use on automobiles.

CONCLUSIONS OF LAW

1. Defendant excepts to the court's conclusion of law contained in paragraph 1 of the court's conclusions of law, which reads as follows:

"The articles upon the sale of which the taxes in the foregoing actions, to-wit, nos. 15761, 15762, 15763, 15764, and 15765, were collected are not parts or accessories for any of the articles mentioned in Subdivisions (1) and (2) of sec. 900, title IX of the Revenue Act of 1921, or sec. 600, tit. VI of the Revenue Act of 1924, and the said taxes were illegally assessed and collected."

in that there is no evidence to support such conclusion of law and such conclusion of law renders the provisions of section 900 of the Revenue Act of 1921 and section 600 of the Revenue Act of 1924 and section 424 of the Revenue Act of 1928 ineffective and unenforceable: that such conclusion of law is contrary to the express provisions of said sections and such conclusion is not supported by the facts found by the court nor the evidence adduced at the trial of these cases.

2. Defendant excepts to the court's conclusion of law contained in paragraph 2 of the court's conclusions of law which reads as follows:

"In case no. 15761 the plaintiff is entitled to judgment for the amount of taxes illegally collected in the sum of $89,195.36, together with interest upon the amounts of taxes paid from the

50 date of their respective payments at the rate of 6% per annum to a date set by the Commissioner of Internal Revenue of the United States, such date to be not more than thirty days earlier than that of the refund check.".

in that there is no evidence to support such finding and such conclusion renders the provisions of sections 900 of the Revenue Act of 1921 and section 600 of the Revenue Act of 1924 and section 424 of

the Revenue Act of 1928 ineffective and unenforceable; that such conclusion of law is contrary to the express provisions of such sections and such conclusion is not supported by the facts found by the court nor the evidence adduced at the trial of this case.

3. Defendant excepts to the court's conclusion of law contained in paragraph 3 of the court's conclusions of law which reads as follows:

"In case no. 15762 the plaintiff is entitled to judgment for the amount of taxes illegally collected in the sum of $249,275.32, together with interest upon the amounts of taxes paid from the date of their respective payments at the rate of 6% per annum to a date set by the Commissioner of Internal Revenue of the United States, such date to be not more than thirty days earlier than that of the refund check."

in that there is no evidence to support such conclusion of law and such conclusion of law renders the provisions of section 900 of the Revenue Act of 1921 and section 600 of the Revenue Act of 1924 and section 424 of the Revenue Act of 1928 ineffective and unenforceable; that such conclusion of law is contrary to the express provisions of said sections and such conclusion is not supported by the facts found by the court nor the evidence adduced at the trial of these cases.

4. Defendant excepts to the court's conclusion of law contained in paragraph 4 of the court's conclusions of law which reads as follows:

"In case no. 15763 the plaintiff is entitled to judgment for the amount of taxes illegally collected in the sum of $189,853.88, to gether with interest upon the amounts of taxes paid from
51 the date of their respective payments at the rate of 6% per annum to a date set by the Commissioner of Internal Revenue of the United States, such date to be not more than thirty days earlier than that of the refund check."

in that there is no evidence to support such conclusion of law and such conclusion of law renders the provisions of section 900 of the Revenue Act of 1921 and section 600 of the Revenue Act of 1924 and section 424 of the Revenue Act of 1928, ineffective and unenforcible: that such conclusion of law is contrary to the express provisions of said sections and such conclusion is not supported by the facts found by the court nor the evidence adduced at the trial of these cases.

5. Defendant excepts to the court's conclusion of law contained in paragraph 5 of the court's conclusions of law, which reads as follows:

"In case no. 15764 the plaintiff is entitled to judgment for the amount of taxes illegally collected in the sum of $173,934.45, together with interest upon the amounts of taxes paid from the date of their respective payments at the rate of 6% per annum to a date set by the Commissioner of Internal Revenue of the United States, such date to be not more than thirty days earlier than that of the refund check",

in that there is no evidence to support such conclusion of law and such conclusion of law renders the provisions of section 900 of the Revenue Act of 1921 and section 600 of the Revenue Act of 1924

and section 424 of the Revenue Act of 1928, ineffective and unenforcible; that such conclusion of law is contrary to the express provisions of said sections and such conclusion is not supported by the facts found by the court nor the evidence adduced at the trial of these cases.

6. Defendant excepts to the court's conclusion of law contained in paragraph 6 of the court's conclusions of law, which reads as follows:

"In case no. 15765 the plaintiff is entitled to judgment for the amount of taxes illegally collected in the sum of $41,764.57, together with interest upon the amounts of taxes paid from the
52 date of their respective payments at the rate of 6% per annum to a date set by the Commissioner of Internal Revenue of the United States, such date to be not more than thirty days earlier than that of the refund check".

in that there is no evidence to support such conclusion of law and such conclusion of law renders the provisions of section 900 of the Revenue Act of 1921 and section 600 of the Revenue Act of 1924 and section 424 of the Revenue Act of 1928, ineffective and unenforcible; that such conclusion of law is contrary to the express provisions of said sections and such conclusion is not supported by the facts found by the court nor the evidence adduced at the trial of these cases.

W. J. MAHON,
Atty. for Deft.

In United States District Court

Opinion of Court

Entered Sep. 15, 1931, in nos. 15761, 15762, 15763, 15764, 15765, by West, Judge

WEST, District Judge:

No lengthy opinion is required. Under the facts found, the plaintiff's batteries were not "parts" of automobiles. Universal Battery Co. v. U.S., 281 U.S. 580. They were equally adapted for use on automobiles and many other machines making use of electric energy. They antedate the automobile and were not called into existence by its advent. And they seem to be no more a "part" of an automobile than of a power boat, a dental drill, a time-clock, or any other of the many devices to the operation of which they are
53 necessary. Being just as essential and just as well adapted to use in a multitude of other machines, they are not primarily adapted for use in motor vehicles. Phila. Storage Battery Co. v. McCaughn, Collector, 21 F. (2d) 320; Elec. Storage Battery Co. v. McCaughn, Collector, (D.C.E.D. Pa.) unreported; Weir, etc. v. McGrath, Col., 41 F. (2d) 1021 (C.C.A. 6), affirming a decision by Judge

Hickenlooper, reported in Cum. Bull. VII-2, p. 338, which disposes of the government's claim of voluntary payment. Payment of the taxes was not voluntary, but if it was, still the action lies in view of the amendment of R.S. 3226 by the Act of June 2, 1924.

The objection to the court's jurisdiction founded on sec. 424, Rev. Act 1928 (tit. 26, sec. 2424 U.S.C.) has heretofore been ruled on. There is an error in that opinion where it is said that any refund after judgment would be pursuant to sub (3) of sec. 424 and would be conditional and for the benefit of consumers. If refunds are made, they may be under either sub (2) or (3), depending upon whether the plaintiff bore the tax or passed it on, etc. Those are matters for the Commissioner to decide; the court has nothing to do with them, and no evidence respecting them was offered.

According to two recent decisions of the Court of Claims, Boyle Valve Co. 1. U.S., 38 F. (2d) 135 and Jefferson Elec. Mfg. Co. U.S., id. 139, the absence of such evidence should prevent recovery. But with great respect, I am unable to agree with the holdings on that point. I still think it is for the Commissioner alone to determine the facts necessary to be established as the basis of refunds under either sub (2) or (3). Where as here, taxes on sales not taxable have been collected, then on proof to the satisfaction of the Commissioner "that such amount was not collected, directly, or indirectly, from the purchaser or lessee", or if collected, has been returned, they may be refunded. "Such amount" refers back to "any amount paid or collected from any manufacturer, producer, or importer" and not to the excessive payments mentioned in the first clause of sub (2). "Any amount paid or collected", etc., will include payments that are excessive and those which are wholly illegal. If that is not so, then the case of the man who pays a tax which is entirely illegal and who does not pass it on to his customer, is unprovided for; he can get no refund, while the manufacturer
54 who is merely overassessed may. Congress could not have intended such an unjust result, and the language employed can very properly be construed to prevent it.

A certificate of probable cause under tit. 28, sec. 842, U.S.C., will issue for the benefit of the defendant.

At the conclusion of the evidence, defendant moved to dismiss the petitions and for judgment in his favor in each case, which motion was overruled and exceptions allowed. Both parties requested findings of fact and conclusions of law and, with some changes, the draft presented by plaintiff has been adopted. Defendant's exceptions to the special findings and conclusions, and to the refusal to find as he requested, were duly allowed.

Judgments for plaintiff as prayed, with interest as provided by law. See sec. 615, Rev. Act. 1928.

Sept. 15. 1931.

In United States District Court

Order of judgment

Entered Oct. 27, 1931, in no. 15761, by West, Judge

This cause coming on to be heard upon the pleadings, the evidence and the argument of counsel, the court having made special findings of fact and conclusions of law in this and four other cases consolidated herewith, which findings of fact and conclusions of law are hereby referred to on due consideration of the premises, it is

Ordered, decreed, and adjudged that the plaintiff recover from the defendant the sum of $89,195.36, together with interest on the following amounts of taxes paid from the following respective dates of payment at the rate of 6% per annum to a date set by the
55 Commissioner of Internal Revenue of the United States, such date to be not more than thirty days earlier than that of the refund check to wit:

$34,731.30 from October 31, 1922;
31,097.01 from November 29, 1922;
23,367.05 from December 30, 1922.

It is further ordered that plaintiff recover its costs herein expended, taxed at $_____.

Defendant is allowed his exceptions to this judgment and to said findings of fact and conclusions of law.

Approved as to form.

W. J. MAHON, *U. S. Atty.*

In United States District Court

Certificate of probable cause

Filed Oct. 27, 1931, in no. 15761

The court having rendered judgment herein in favor of the plaintiff in the amount of $89,195.36, together with interest and costs, said judgment being against C. F. Routzahn, a duly appointed, qualified, and acting collector of internal revenue, upon consideration of the evidence, the court finds and hereby certifies that the said judgment is for the recovery of money collected by the said defendant as collector of internal revenue and by him paid into the Treasury of the United States in the performance of his official duties with reference to the collection of income, excise, and profits taxes, and that there was probable cause for the act so done by the said defendant collector, by reason whereof the judgment herein was rendered.

S. H. WEST,
United States District Judge.

56 In United States District Court

Defendant's narrative form, bill of exceptions

Filed Dec. 14, 1931, in nos. 15761, 15762, 15763, 15764, 15765

Be it remembered that on the trial of the above-entitled causes, consolidated by agreement of counsel, in the District Court of the United States, Northern District of Ohio, Eastern Division, at the April 1931 term thereof, before Honorable Samuel H. West, one of the judges of said court, a jury being waived in writing, the following proceedings were had:

Appearances: On behalf of the plaintiff, Charles C. Norris, Jr., of Hepburn & Norris; W. T. Kinder, of Tolles, Hogsett & Ginn; F. C. Friend, Esq., and Philip Dechert, Esq. On behalf of the defendant, E. F. McMahon, Esq., and John B. Osmun, Esq., assistant United States attorneys.

Thereupon statements of the case were made by counsel for the respective parties.

PLAINTIFF'S TESTIMONY

Willard L. Reinhardt, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. NORRIS:

My name is Willard L. Reinhardt. I am chief engineer of the Willard Storage Battery Company, and have been such since November 1929. Previous to 1929 I was chemical engineer for the Willard Storage Battery Company from 1920. Previous to 1920 I was chemist for the Willard Storage Battery Company, starting in June 1918. Prior to 1918 I was superintendent and teacher in Auburn Township consolidated schools, consisting of high schools and grade schools; also teacher of science and mathematics. I had no business experience prior to 1918.

57 In my experience at the Willard Storage Battery Company I am familiar with the storage batteries manufactured by that company, and with the parts and functions of the storage battery. A storage battery is a device for storing electric energy in a chemical form, and of later delivering that electrical energy in electrical form. First we have a container which is usually made out of rubber or other composition materials. Then we have—which I will show you here—an element. This element consists of a cover also and is concealed in the container, and a vent plug to prevent the sloppage of electrolyte, and positive and negative groups. On the negative group we have negative plates which consist of a lug which is burned to a connecting strap. This grid or antigrid or framework is filled with active material. This active material in the case of the negative plate consists of finely divided

metallic lead commonly known as sponge lead. This shows the cover and the two connecting straps a little better, and these rubber casings are to prevent seepage of electrolyte, and the plates are burned onto these straps. Now, we have here a positive plate which is almost identical with the negative plate, except that the active materials are lead peroxide, a very highly oxidized lead. Between the positive and negative plates we have a separator which may be of wood or other forms of perforated rubber. Then after we have the positive and negative plates and separators assembled into this element with its connecting straps and terminal posts, we fill the battery with electrolyte, which is a dilute solution of sulphuric acid. These positive and negative plates alternate in position, which you can determine by looking at the edge of the cell. The brown one is the positive, then next we have a gray one which is negative, another positive which is brown, and so on. The only connection between the elements is at the top. If there is not a separator in the electrolyte, then we have what we call a short circuit and it fails to operate.

When a battery is being charged the current is applied at the positive post—this post; it passes through to the positive plates; then through the electrolyte, through the separators to the negative plate and out the negative post. In doing that the material on the positive plate is oxidized to a very high state of oxidation, and the negative plate is reduced to very finely
58 divided metallic lead. Now when a battery is being discharged the reverse is true. A current passes in the other way and the positive plate reacts with the electrolyte, the active material of the positive plate reacts with the electrolyte, forming lead sulphate; and the same happens on the negative plate—the sponge lead reacts with the sulphuric acid and forms lead sulphate. Then in a discharged battery we have primarily lead sulphate on both positive and negative plates, and therefore it fails to function in giving off any more current, because the two plates are essentially alike at that point. When a battery is charged the electrical energy is stored in chemical form, and it discharges by reason of the application of the circuit, which means the attaching of a wire from the positive to the negative. By this reversed chemical action the electrical energy is discharged from the battery in the form of electric current.

The term "volt" is quite clear to explain in lay language. It probably can best be explained by using the ordinary water analogy which is quite generally known. For instance, if we have water in a closed pipe system we must have pressure to force that water through that system. That pressure is usually denoted or termed in pounds per square inch, or head. In an electrical system we must also have some pressure to force the current through a conductor. It is very analogous to the water analogy. A volt is the term applied

to the electrical pressure which forces electric current through the electric system.

In reference to the word "ampère", in the water system we always have a definite amount of water flowing. This is usually termed gallons per minute, or may be termed just gallons. The same is true in an electric system; there is always a certain amount of current flowing. The amount of current flowing is termed the ampere, the same as gallons applied to the water system.

In explanation of the expression "ampere hour"—in the water system if you have one gallon flowing for an hour, that would be that many gallons, that would be one gallon an hour; in an electrical system if we have one ampere flowing for one hour, we have one ampere hour. It is the product of the two.

The explanation of the phrase "internal resistance" as ap-
59 plied to an electric storage battery, is that every electrical conductor offers some resistance to the passage of electricity or current. When we speak of an electric system in which a storage battery is a part, we always refer to the internal resistance of the storage battery as being that part of the resistance of the entire circuit, which is between the two terminals of the storage battery.

I have explained the various constituent parts of a storage battery by taking one group of elements from a particular compartment. That group is called an element; or placed in a suitable container, it is called a cell. A cell produces two volts. The voltage of a cell is always two volts regardless of the size of the plates or the number of the plates. The cells which I hold in my hand, being approximately 5½x7½ inches, produce two volts; a cell containing the same number or a larger number or a fewer number of plates, the plates being three to four feet high and two feet wide, produce two volts. A similar cell containing plates as small as two by three inches, with a greater or smaller number of plates, also produces two volts. A cell always produces two volts. If the duty required of the battery is in excess of two volts, you acquire that by using more cells. A cell is essentially a storage battery. We usually define a storage battery as consisting of one or more cells, depending upon the duty required.

There is no difference in the constituent parts of the storage battery from the day they were first invented to the present time. There have been improvements in the methods of manufacture, to the extent that batteries can be produced cheaper and meet competition. The constituent parts of a storage battery have always remained the same. The active material of the positive plate in the original experiments of Plante was lead peroxide; the negative material—the active material of the negative was finely divided lead. They are still the same active material. They still have identically the same constituent parts as they had at the very beginning.

The theory of the storage battery was first discovered by Plante in 1859. It found very few uses for the first twenty years, due to the fact that it took a long time to produce a storage battery. Plante in discovering the theory of the storage battery found that by immersing two lead plates in dilute sulphuric acid and passing
60 a current through them, they produced on one plate a film of lead peroxide, on the other a crystaline finely divided, lead deposit. Then connecting the two terminals of these plates which were immersed in sulphuric acid, he found that he produced a current, produced electricity. Now this simple cell of Plante remained a little more than a laboratory experiment until about 1880, when, almost simultaneously, Charles F. Brush, of Cleveland, and Fourier, of France, discovered a new means of producing a battery; that is, of casting a framework of lead and applying the active materials to that framework. The industry was also given further impetus at about that time by the development of the dynamo or electric generator for charging storage batteries. Previous to this time the only method available for charging batteries was primary cells.

A primary cell is one which cannot be recharged. A dry battery is a primary cell. With the development of the electric generator—and also I might mention that by this time they had found quicker and better methods of forming Plante plates, which also gave the industry impetus—the industry grew, and they were finding a wide variety of uses after 1880. Some of these uses were driving dental tools, tramways, ignition of gas engines, the driving of sewing machines, electric fans, and various applications where electric motors could be used. They were also used in railway lighting, electric signals, and vehicle or carriage lights about this time. They were also used on electric enunciators or bell ringing. In the period 1888 to 1893 the industry was retarded to a considerable extent by several companies holding storage battery patents, which resulted in the situation that one company could hardly go ahead without infringing the patents of the other. This retarded the industry to a considerable extent, and was finally cleared up in 1893 or '94. Beginning 1893 or 1894 storage batteries began to be manufactured and used in a wide variety of uses, as train lighting, traction batteries for hauling materials in plants, and also for other uses of railway lighting, railway signals, and central stations. Generally, it was a very wide use as the field of uses for portable electricity developed. One of the largest uses after 1893 was railway lighting, railway signals, carriage lighting, telephone work, telegraph, and ignition in gas engines, and, up to the present time, for radio.

61 As to the first use of storage batteries in connection with automobiles—in about 1908—they were used for automobile lighting. The use never became very extensive in the same respect it has today. Automobiles had been lighted by acetylene lamps, but the first use of storage batteries to any respectable extent was beginning about 1908 to 1910. In 1911 Mr. Kettering applied the

storage battery to the automobile for the purpose of starting, lighting, and ignition. He invented a starting, lighting, and ignition system which he sold for use in automobiles. It is generally known in the industry that he selected a battery for that purpose—24-volt battery, which was formerly used for railway signal work. A 24-volt battery means a 12-cell battery. It was determined that that particular battery was applicable to that starting device because it was a battery that was suitable for the duty requirements of that particular job. That starting device was not used extensively immediately after 1911 or '12. I would say it was used extensively beginning 1912 or 1913. After that the field of use was a very large one because there were so many internal combustion automobiles.

The principle of the cranking device for internal combustion engines, contemporaneously with the use on automobiles, was used in isolated house-lighting plants and on motor boats.

The COURT. Are you talking about the Delco system now?

The WITNESS. Yes.

Mr. NORRIS. That is a generic term. There are a number of systems.

The COURT. Well, the Dayton Electric Laboratories Co. was organized by Kettering, wasn't it?

The WITNESS. Yes; house lighting.

The COURT. He had a system known as a house-lighting system, which included starters?

Mr. NORRIS. Yes.

62 The COURT. You say the starter was applied to various other uses besides automobiles?

The WITNESS. Yes, sir.

(Narrative continued:) As I said, the starter was applied to house lighting and starting engines, such as gas engines, diesel engines, tractors—starting devices have been used on tractors.

I have stated a storage battery is a device for storing electricity in portable form. There is practically no limit to what a storage battery can be used for. It all depends whether the requirements are such that it can be used. The discharge rate of a battery is the amount of current that is flowing at a particular time. There is a difference within the battery itself as to the discharge rate. That difference is usually accomplished by using either larger plates or a limited number of plates to accommodate—to secure a battery for a larger discharge rate. I mean by that there must be an increased area of plates subjected to exposure to the electrolyte. If that is so there is a higher discharge rate at a particular time than if there was a smaller area of plate surface exposed for the action of the electrolyte; a battery with a large number of plates is capable of a higher discharge rate than one with a smaller number of plates.

The COURT. Is that true of batteries of equal number of plates, but in one battery of plates a greater area than the other?

The WITNESS. It all depends on the area.

The COURT. I understand; but it is not the number of plates that is the controlling factor, but the area of the combined plates?

The WITNESS. The area of the combined plates.

Q. In other words, if you desire to increase the discharge rate of this battery having these particular plates, you would either have plates of larger size or a greater number of plates?

A. Yes, sir.

63 Q. Mr. Reinhardt, is there any distinguishing characteristic which makes a storage battery primarily adaptable for use only on an automobile?

Mr. MCMAHON. The Government objects to that question for the reason it calls for the conclusion of the witness.

The COURT. I will hear from you, if that is the question the court has to decide.

Mr. MCMAHON. Yes; not only the question the court has to decide, but here is the question—the question is not limited to the essential elements that he mentions. In other words, they are not fixed. If the court please, the objection is fundamental in this: Here you have a six-volt battery which normally is used in automobiles. He has been describing here in general terms batteries; he has been talking about batteries with plates from two to ten feet high. He has not taken into consideration the elements; he has not taken into consideration the numbers of the plates; he has not taken into consideration the duty to be performed which is determinative of the design of the battery. In other words, any answer that the witness might give without knowing those definite things, that is, what is particularly mentioned or what he is particularly seeking to inquire of limiting the batteries, would be a hazardous guess on a general basis.

Mr. NORRIS. May I suggest, to shorten it, if I ask the question whether there is any distinguishing characteristic in a storage battery adaptable for use on automobiles which makes it primarily adaptable only for use on automobiles? Then I think my question is without error.

Mr. MCMAHON. The Government objects to that question, too, because it calls for the conclusion of the witness and is usurping the power of the court.

The COURT. Just reframe your question.

64 Q. I will ask you, Mr. Reinhardt, does a storage battery perfectly applicable for use in an automobile have any distinguishing characteristic which makes it peculiarly adaptable for use only on the automobile?

Mr. MCMAHON. The Government objects to that question, for the reason it is calling for the conclusion of the witness and usurping the power of the court.

The COURT. Objection overruled.

Mr. MCMAHON. The Government excepts and reserves the right to file a bill of exceptions.

A. No.

Q. Mr. Reinhardt, after all, what is the criterion of a storage battery? A. It is the duty requirements.

Q. So that in every use of storage batteries where the duty is the same, is a battery applicable for one use just as applicable for another use? A. If the duty requirements are the same, it is.

Mr. NORRIS. May I correct that question? Instead of using the word "applicable" I would like to use the word "adaptable." Cross-examine.

Cross-examination

By Mr. McMAHON:

In my direct examination I testified that the batteries back in 1908, '11, '18 '20, '29, on up to the present day had the same constituent parts, which you can call elements. By the same constituent parts I mean the same materials; in other words, I mean the same base raw materials. In many cases the plates used in batteries today, in each cell of the batteries today, are the same size and type as the plates used in the batteries in 1908, namely, in the case of batteries used for a variety of purposes. For example, various lighting batteries, portable lighting batteries. The Willard Company made a battery, a six-volt battery in the early days which was used. I mean in the period specified, around that period, which was used for a variety of purposes, ignition purposes and lighting purposes. It may have been on an automobile; the ignition may have been for gas engines or other purposes; it may have been lighting for boats. The starting batteries used in 1908 had the same base materials as those used in 1924. With regard to the actual number of plates. I couldn't answer the question. I can't answer that question whether they are actually the same as used today or not.

I am chief engineer of the Willard people. We have replicas of batteries manufactured by the Willard people in 1908. I don't have any drawings, pictures, or anything that would give the Court an idea of the kind of battery used in 1893 and '94. I don't know whether we have one of the 12-cell, 24-volt batteries used on the Cadillac at first or not.

Mr. NORRIS. Let me interrupt. We have it here.

Mr. McMAHON. I ask that this article produced by the plaintiff be marked as an exhibit.

The COURT. Do you intend to keep this battery in the record?

Mr. NORRIS. No; we are going to substitute photographs.

The COURT. Then don't mark the battery. Why don't you agree that the picture represents the battery?

Mr. NORRIS. The battery which the witness has been demonstrating is shown by the photograph, plaintiff's exhibit 1.

Q. Mr. Reinhardt, I hand you what has been marked plaintiff's exhibit 1, and ask you to state what that is.

The COURT. We have all agreed that it is a photograph of this battery, so that is in the record. Proceed with something else.

(Narrative continued.) I don't know how many plates are in this exhibit 2. Those exhibits show those batteries to have the same number of cells. They do not show the sealings and covers to
66 be the same. They show the exhaust to be the same principle. They are not the same. There is necessarily a difference between the vent plugs of the two batteries, due to the construction of the cover. The purpose of any vent plug is to prevent acid spray coming out of the battery. Now, it may be it was found that the vent plug in no. 1 did that job better or was cheaper to manufacture than vent plug in no. 2. The batteries used in a large submarine boat have vent plugs. As I recall it, they are not exactly the same, but they answer the same purpose. The batteries used in connection with stationary engines have covers. It might not be necessary in some cases to have a cover. The purpose of a cover is twofold: to keep the dirt out and to keep electrolyte in. The cells on charge are usually gassing in the end of the charge, and that gas will carry with it sulphuric acid, which is likely to corrode equipment, especially metal equipment very near it. It is absolutely necessary to have a cover if you have corrodable equipment near it. There are parts of the engine that would be corroded by acid spray. If the battery was 30 or 40 feet away from the engine, whether it would be necessary to have a cover or vent plug would depend upon the charging rate and size of the room.

Plates used by LaPlante in his first experiment were sheets of pure lead. His experiments with pure lead plates were not very successful. I don't know whether the pure lead plates that LaPlante used in the batteries he constructed were of the same size and shape as the lead plates used in batteries similar to plaintiff's exhibits 1 and 2.

The old time crowfoot battery—in glass jars, five fingers sticking out forming a lead pole—was a primary battery, not a dry cell; one that is not rechargeable. The crowfoot battery that was used in connection with telegraph instruments back around the '90s was primary and not rechargeable. When that battery had served its purpose, electricity was renewed usually by restoring the solution and adding a new zinc crowfoot. That is an entirely different type of battery from plaintiff's exhibit 1.

I know very little about the history of the Edison storage battery. I think that was developed a little after the acid type batteries. The basic elements in the Edison type battery manufactured by the Edison Company are not the same as those shown in plaintiff's ex-
67 hibit 1. The basic elements in our battery, exhibit 1, are sulphuric acid electrolyte, lead peroxide on the positive plate, and sponge lead on the negative. The Edison has alkaline electrolyte, iron oxide plate, and a nickel oxide plate. I don't know if the size, shape, and dimension of those plates as used in the Edison batteries of the six-cell type are the same as in plaintiff's exhibit 1.

There are advantages in adopting the acid type battery over the alkaline battery. The voltage of the alkaline battery, as I recall it, is one and a half volts per cell, while this is two volts per cell. That

is the main advantage. For the same capacity the Edison battery might require more space. That would not necessarily affect the matter of portability. I didn't say it weighed more; it may weigh less. It is a larger battery and it is more bunglesome to handle. That affects the question of portability to that extent, at least. I would say the acid type battery was more adaptable for use in starting the ordinary automobile than an Edison storage battery of the same number of cells for that purpose, because the Edison storage battery has less voltage per cell. That might also be true when it comes to the matter of space in carrying, or the portability of the battery. It would possibly require a little more space.

They have both six and twelve volt batteries that are used on motor boats; I wouldn't say all motor boats. I can't give that answer as to the sizes of all batteries used on all motor boats. I don't believe I made the statement that the 24-volt battery was used generally on motor boats in 1912 for starting purposes. The starter I stated Dr. Kettering invented was for starting an automobile. It could be used for starting a motor boat. There would not necessarily have to be any changes in it if the duty requirements were the same. A motor boat engine couldn't set on the same level an automobile engine does. It might not necessarily be the same.

The same cells used in a 24 volt battery are used in railway signal work. A 24-volt battery is a 12 cell battery. I said the same cell was used for railway signal work. Dr. Kettering selected the 24-volt or 12 cell battery for use in connection with his starter. I didn't say that starter was used on motor boats. I don't know that was the battery used on motor boats. I cannot say it was used on tractors.

I don't know whether it actually was used on lighting plants
68 or not; I don't know. It had some uses. I know that it was used for signal work. I don't know how many of those signal work batteries were used during that period. In those early days tractors were not used as extensively as they are today. The batteries used might not be extensive, but it would be general use. They could be a general use. If you have 500 light plants in the United States in those days using this 12-cell, 24-volt battery, I would call that an extensive use only in that particular industry. As far as territory is concerned, it would be rather limited.

I don't recall the date tractors first came onto the market. It has not been so very long ago. I can't answer whether it was some time after the automobile. The duty to be performed on a tractor is the same as that to be performed on an automobile, generally speaking. Tractors don't generally have the same number of cylinders, usually less than an automobile engine. The cylinders are wider, too. You may have more gasoline consumed. The more gasoline you have in a cylinder head, the more spark it takes to ignite it.

Q. And you told us the use to which a battery is to be put determines its design, didn't you?

A. The duty requirement——

Mr. NORRIS. Pardon me; that is not what he said at all.

Q. The duty requirement——

A. Is what determines the battery to be selected for a particular use.

Q. Then a tractor having a motor with less cylinders, and consuming more gasoline than an automobile in its larger size cylinders and greater piston displacement, requires a greater spark or greater delivery of current during a given instant than is required in a motor used in an automobile, isn't that correct?

A. It may or may not be. There are a lot of factors involved there that you can't give a definite answer.

The Court. Well, tell the court whether as a practical matter batteries on tractors differ from those on automobiles?

The Witness. No, the same batteries have been used both on tractors and automobiles.

69 Mr. McMahon. We don't dispute that, not at all. There is no question in my mind but what you can take a battery that you use on an automobile and put it——

The Court. Put the question to him. I want to get the case tried with reasonable speed.

Q. Does a battery used on or in connection with an automobile require more rugged construction than a battery used on or in connection with a tractor?

A. No.

Q. Does an automobile cross the same terrain that a tractor crosses?

The Court. You don't need to answer that question. Those are matters that the court knows. Let's get along and don't waste time on unnecessary questions.

Mr. McMahon. I beg the court's pardon. It was my understanding that he testified that the duty to be performed was the thing that determined the battery, and I was trying to find out if the duties of the two were the same.

The Court. I was trying to make that plain. He was talking about the duty of the battery, not the duty of the machine upon which the battery was located.

Mr. McMahon. The operation of the machine is the thing.

The Court. The battery doesn't operate the machine. Proceed.

(Narrative continued:) A battery that is made for lighting purposes on an automobile can be used for starting purposes. Batteries used on automobiles today are designed for starting, lighting, and ignition. Prior to the advent of the automobile we had batteries that were used for lighting purposes. Batteries used for lighting purposes require the delivery of current for a longer period of time. That current is supplied by the storage battery. That affects the construction of the storage battery: you would have to have either larger plates or a larger number of plates. They could

70 be the same thickness. If you wanted the plate to give longer life then you would have to make it thicker. A battery that is used only for ignition purposes on an automobile, I have seen

used for starting the motor. That is the battery setting right there [indicating]. That is a six-cell battery. A one-cell battery will deliver two volts. Two volts is sufficient to supply the ignition, but will not turn over the ordinary automobile engine.

Q. Did the adoption of the battery for use in starting, lighting, and ignition of an automobile necessitate a change in the size of plates of batteries formerly used for lighting automobiles or for signal work?

A. No.

Q. Then the added duty of starting automobiles and ignition of automobiles to the battery formerly constructed for lighting purposes did not necessitate a change in the construction of the battery?

A. It might require more plates.

Q. Well, that would be a change in the battery, wouldn't it?

A. Yes.

(Narrative continued:) The battery used for starting an automobile does not require a thinner plate, neither does the battery for lighting. None of them require a thin plate. To have a thin plate is a matter of economy. The thin-plate battery will not have a longer life than a thick-plate battery. A thick-plate battery will deliver as great a current at a given point at a given instant as a thin-plate battery if it has the same number and size of plates. You can't put the same number and size of plates in the same dimensioned cell; that is, thick plates and thin plates.

The design of a battery is determined by the duty that is required of it. I do not necessarily mean the delivery of the current only. Voltage is a factor. You might have an electrical appliance that would require ten, twenty, or thirty volts. Convenience of portability would be a factor in the design.

As to how I account for the various changes taking place in the construction of batteries between 1911, when the Cadillac adopted the 12-cell battery, and 1924, most of the changes have been matters of refinement and mainly for the reason of lowering costs, so that the commodity can be sold to the public at a lower price. There
71 is not much change in the duty required of the 12-cell battery used in 1911 and the 6-cell battery used in 1924, for starting, lighting, and ignition of automobiles. There isn't much change in duty requirements or in the construction. The development from the 12-cell battery in 1911 to the 6-cell battery in 1924 is due to the fact that the six-voltage battery could be manufactured cheaper than the twelve-volt battery. The six-volt battery performed the same duty that the 12-cell battery did.

Q. Well, how do you harmonize that with your statement that the duty to be performed determines the design or the use to which a battery is to be placed? A Well, certain duty requirements that have to be met. It is power that you are after to get in a battery. You can get that one of two ways; you can use a higher voltage and

fewer plates, or lower voltage and a larger number of plates and get the same power.

Q. Well, what I am trying to find out from you is this: Why did they quit using the 12-cell battery and start using the 6-cell battery? A. It is my opinion it was largely a matter of economy.

(Narrative continued.) The connections used on the battery, plaintiff's exhibit 1, and those used on plaintiff's exhibit 2, are different. That may be brought about because the original duty requirements of this battery may have been less than this battery. I don't think they were exactly the same size cells. The battery has the same voltage. One of the connectors on plaintiff's exhibit 2 is corroded. You will notice that there were two nuts that held that connector on, and between those two nuts tighten on a brass stud; sometimes the acid gets in there and corrodes that. That cannot occur in the connector shown on plaintiff exhibit 1. There is a difference in the construction of those two batteries with respect to intercell connections. You could not fit the intercell connector of plaintiff's exhibi 2 on the terminal post of plaintiff's exhibit 1. I don't recall the exact date when that change was effected; I can't give an idea about when. Plaintiff's exhibit 2 was the 1908 battery and plaintiff's exhibit 1 is a 1931 battery. It apparently occurred between 1908 and 1931.

Necessarily there are some changes in the first starter made by Dr. Kettering and the starter used on a majority of the automobiles on the streets today, because the first starter was 24 volts; now
72 the majority of them are six volts. Power requirements of the starter used on an automobile has something to do with the design and construction and assembly of the battery used on or in connection with that automobile engine. I can recall no specific changes occurring in those starters around 1919, 1926. They used to have starters that pullled a chain—pushed down on a long pedal and a chain was pulled; you didn't have the lever of today and the convenient little button you push in the bottom of your car. I don't know whether the vent plug in the 12-cell battery they used on the Cadillac in 1911 is the same as the vent plug in plaintiff's exhibits 2 and 1. The 24-volt battery used in 1908 had sufficient plate area to be used regularly for starting a Cadillac. I don't know of any automobile today that uses the same number of cells in its battery for starting, lighting, and ignition purposes as were used in 1908. Plaintiff's exhibit 2 would perform the same duty in 1924 that it was made to perform in 1908.

(Noon recess taken.)

Defendant's exhibit A is a bulletin of the Willard Storage Battery Company, no. 136. I cannot tell what year that was put out. A battery for use in connection with a tractor or truck may in some types of truck and tractor service require a more rugged construction

than a battery used on or in connection with an automobile. I don't know whether motor boats require the same duty of a battery that is required in its use in an automobile.

The batteries used on automobiles generally during the years '22, '23, '24, '25, and '26 were our SJ types, C types, SL types. The SJ is those types referring to the plate used in that battery. It refers to the height of the plates. They all refer to the plates, size of the plates. That designation has been followed from year to year. It is my understanding that during those years a 13-plate SJ battery would be designated as SJ-4. An 11-plate battery would be SJ-3. During those years the number of cells was usually three or six; the number of plates might vary from seven up to twenty-one per cell.

Q. How did you designate batteries used on or in connection with automobile trucks or automobile wagons?

A. All of those batteries regardless of the use, were given the same designation.

73 (Narrative:) They had the same number of plates. The plates were of the same thickness for the same type of battery. The battery was of the same general construction and design. In some cases a truck requires the same duty of a battery as an automobile does, where they are used for the same purpose, that is, the same kind of truck. A heavy-duty truck may or may not require the size, type, and number of plates in the battery, depending upon the electrical system on the truck. A 6-volt battery is usually used on a motorcycle. That is a smaller size than exhibit 1. The plate compositions are the same. The sizes of the plates are not the same. The number may be the same.

Batteries similar to plaintiff's exhibit 1 are used as original equipment in automobiles by automobile manufacturers. I know some makes of cars that are using Willard batteries. Studebaker, Reo, and Oldsmobile, Hupmobile, are a few of them.

As chief engineer for the Willard people I do not design and build batteries for submarine purposes. I design and build them for lighting plants. We don't build any that I know of personally for original equipment of lighting plants; they are all for replacement in light plants. Some of those batteries are contained in glass jar containers. Sometimes we supply a battery similar to plaintiff's exhibit 1. Willard batteries were used as original equipment in trucks. They are used in the White, but I don't recall any others at the present time. We have made batteries for Ford. His trucks may or may not be equipped with our batteries. In some cases the Ford car is equipped with our battery as original equipment. We furnish batteries as original equipment on motorcycles. I would consider an ambulance as an automobile.

Theodore A. Willard, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Nomis:

I am a director of the Willard Storage Battery Company, which was incorporated in 1902. That was the result of incorporation of a partnership known as Sipe & Sigler, of which I was a partner, and that partnership was formed about 1898.

74 I first began building electric storage batteries in a commercial way in 1895. The first batteries were used by physicians, the next batteries were used by Edison phonographs, followed by batteries for Western Union Telegraph Company, fire alarm signal systems, and on down in many uses; in fact, a battery is used in any place where stored energy is required in their multitudinous uses. There are too many to think of now, but we went on into train lighting and then on into the automobile, electric automobile, and then automobile lighting, lighting and starting. As we manufactured and sold for one field we would continue to manufacture and sell for another field.

The catalogue handed me is one issued by Sipe & Sigler in 1901. (Catalogue last referred to marked "Plaintiff's Exhibit 3.")

From the time we first began building electric storage batteries up until the present time, there were no differences in the constituent parts of the storage battery. Whatever changes were made in the storage battery were due to requirements of different voltage and different capacity, but the essential parts were always the same. There has been no refinement in the manufacture except to bring the cost down, certain developments, lowering prices in competition.

(Plaintiff's exhibit 3, particular attention being called to page 25, offered and received in evidence and is attached hereto and made a part hereof.)

Cross-examination by Mr. McMahon:

The essential parts of the battery manufactured in 1895 for use by physicians, in connection with phonographs, Western Union, and fire alarms, were always the same as plaintiff's exhibit 1; batteries have never changed much. By "essential parts" I mean the plates and the separators and the containers, connectors, vent plugs, and so forth. We did not use the same hard-rubber container in the batteries manufactured in 1895 as used in plaintiff's exhibit 1. We used practically the same vent plug and the same intercell

75 connector. I couldn't give you a date as to when the change in the connector as shown in plaintiff's exhibit 2 was made. My memory fails me on that. We manufactured batteries of various cells, among which were six; three-cell batteries, six-cell batteries, and so forth. There wasn't any such thing as batteries for use in starting automobiles in 1895. The battery may have been used with stationary engines; batteries were used for ignition in stationary engines. The size of those batteries was about the same as an automobile battery, starting and lighting battery today, about six cell. I couldn't answer the question whether the batteries manu-

factured by us in 1905 contained the same number and size of plates found in plaintiff's exhibit 1. They at first contained the number of plates necessary to do the work, to give them capacity enough to do what they were required to do; but as to the exact number I don't know. By "constituent parts" I referred to the detailed parts of a battery, that is, the connectors, vent plugs, and plates, and separators, and those things are, you might say, the details, the detailed parts of a battery. That does not refer to the size of the plate area. It refers to the parts of the battery. All batteries practically have the same parts. I would say the base materials going into the construction of those parts of a battery were the same. Batteries have never changed in that regard.

We started manufacturing batteries for use in starting automobiles about 1908. There was a gradual, you might say fluctuating increase for several years; some periods of time, the development would lie, as far as sales were concerned, quite rapid, and at other times slow. In 1908 we started using batteries in connection with automobiles for lighting purposes, and in 1911 we started making them for starting and lighting and ignition. We did not make a 12-cell or 24 volt battery used by the Cadillac people in 1911. We started supplying batteries for use as original equipment of automobiles and automobile trucks about the same date, about 1908, and '11. There hasn't been any decided changes made that I know of in the design and construction of electric storage batteries between 1908 and 1926. There has been a gradual cutting down of the amount of materials due to competition, and due to the fact that cars didn't have as heavy requirements. By cars I mean automobiles.

76 Q. Would you say that the advent of the automobile was directly responsible for the changes in refinement in the design and manufacture of a battery since 1908?

A. No; that would have taken place in any event.

Q. You think that the other uses would have been sufficient to have required it?

A. Yes.

Q. What is your greatest user of electric storage batteries of the type identified here as Plaintiff's Exhibit 1?

A. Starting and lighting.

Q. Starting and lighting on what?

A. Automobiles.

(Narrative continued:) We build batteries for use on submarines only in an experimental way. We build batteries for propulsion purposes on industrial tractors. I couldn't give you the details of the industrial tractor batteries, only that the plates were the same as used for automobile starting and lighting. I think they were most all six-volt batteries, but I am not sure of that. I think the size of the cells depended upon the requirements. I couldn't say as to that; I have forgotten as to that. All automobiles do not require the same size or type of a battery. An automobile with a very large

engine requires more plates in the elements of the battery working at the same voltage, six volts. The wide range of batteries used in connection with automobiles as to size and dimensions is due to the size of the engine and the size of the car and the necessary power required to crank the engine. The sizes of those variations are determined by the manufacturer of the automobile. That would apply also to different types of automobiles.

Robert J. Nightingale, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. NORRIS:

I am vice president in charge of manufacturers' sales of the Willard Storage Battery Company, and have been in the employ of that company since December 21, 1908, as manager of wholesale sales.

77 In the course of my duties I have to do with the making of contracts for the sale of storage batteries to manufacturers of automobiles.

When an automobile manufacturer designs a car or changes the present design, he inquires as to the size of battery that will meet the requirements set forth in the test. That may be dependent on the cranking of the motor or other uses to which the battery is to be put, and the additional load also is taken into consideration, such as in modern automobiles.

Q. In other words, in any contract in any sale of storage batteries to automobile manufacturers by the Willard Storage Battery Company, did your company ever receive drawings or specifications of a battery to be built by you? Or, on the contrary, did you select the battery which met the requirements and then bid on it and submitted that to the manufacturer.

A. We are always asked to select the battery that will perform the duty.

Q. So that the entire criterion is the duty required?

A. The duty required by the automobile.

Q. So that the automobile manufacturer adjusted his automobile to the storage battery?

A. Both as to size and as to location.

Cross-examination by Mr. MCMAHON:

All of the batteries we sell as original equipment in automobiles do not possess the same number of plates or the same thickness of plates. There is no classification of the batteries manufactured by Willard as to the class of automobiles which we are supplying under our contract, make of automobiles. All makes of automobiles do not require the same designated battery type or size. All makes required different sizes.

Defendant's exhibit A is Bulletin 136. I cannot place the time that that bulletin was issued. I don't have to do with booklets.

78 Carl T. Klug, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. NORRIS:

I am in the employ of the Willard Storage Battery Company and have been employed since 1914. I am in charge of the original equipment sales promotion of the Willard Storage Battery Company, under Mr. Nightingale, assistant sales manager.

Plaintiff's exhibits 4, 5, 6, 7, 8, and 9 represent storage batteries manufactured by the Willard Storage Battery Company beginning about 1914 and extending through the year 1922.

We sold many of the same standard SLI batteries to concerns manufacturing different types of machinery other than automobiles. Amongst those we have road building machinery, such as the Acme Manufacturing Company, of Frankfort, New York; the Ames Iron Works, of Oswego, New York, who built a road roller which was equipped with a starter and storage battery; and we also sold considerable quantities to marine motor manufacturers—Sterling Engine Company of Buffalo, the Standard Motor Construction Company of Jersey City, Red Wing Motor Company of Red Wing, Minnesota; the Gray Marine Motor Company of Detroit; in fact, I can give you twenty to twenty-five names in that class if you desire. That applies generally to the sales during the period 1922 to 1926. I don't know as I can state specifically those particular dates, but we did business with those concerns continuously almost from 1916 up to date, provided, of course, if they still remain in business. Some of them passed out of the picture. We also sold a good many to tractor concerns. Amongst those the Caterpiller Tractor Company, Peoria; Cleveland Tractor Company in Cleveland. There is one that sticks out particularly in my mind—the Moline Plow Company. We sold them one year ten thousand batteries of the standard SLI type to start the engine of the tractor. We also had gasoline shovels—the Thew Shovel Company, the General Excavator Company of Moline; Moline Steamshovel Company,
79 and people of that class. Stationary engines—Beaver Manufacturing Company—in fact, there were many, many uses where the equipment was not of the automobile type. There was one other concern, too, I remember quite distinctly——

The COURT. Now, you have given the court just five, and you say there are many, many. I would like to know if it is true about additional types of uses. You have given me now road building machine manufacturers, marine motors, tractors, gas shovels, stationary engines.

The WITNESS. Gasoline shovels, gasoline cranes.

The COURT. That all comes under that heading of excavating machines.

A. (Continuing.) There are, of course, many manufacturers under each one of those divisions, so that the actual number of batteries used would be quite substantial. There is also harvesting machinery. I remember one concern whom we solicited for battery business who built a small independent harvester—The Gleaner Combined Har-

vester Company, of Kansas City. They built a small harvesting machine which the individual farmer would buy. We solicited its battery business but were not successful in getting it, because it was the experience of this concern in selling this harvester to a farmer he would much prefer to take the battery out of his automobile and put it in his harvester machine rather than buy a battery for his machine. This was quite logical because the harvesting season was short; he would use the battery for two or three months during the harvesting season, whereas the battery would spoil over a long standing period over the winter.

Q. Are there any other uses, other than incidental, of the types of batteries adapted for use in automobiles, which you have sold or seen installed or seen in use in other fields other than the ones you have related just now?

A. I have seen them operating door bells; I have seen them on radios; I have seen them used for telegraph work; I have seen them used in laboratory testing work of various kinds, numerous instances of that kind in the laboratory; I have seen them on—in fact, so in any place where electricity of a portable form is desired there has been a battery used.

Q. Mr. Klug, you have taken the same battery out of various services for the purpose of presenting to the court for this trial?

A. Quite true.

(Narrative continued:) Plaintiff's exhibit 10 is a 12-volt type of battery that was adaptable for and commonly used on a Dodge car from the years 1917 to possibly '24 or '25. That particular battery I myself picked up from a Kohler lighting system in service in the Beaver Falls high school in Beaver Falls, Pennsylvania. It had been in service there for approximately since January '29. The photograph, also marked "Plaintiff's Exhibit 10", is identically the same battery. That battery was picked out of a Dodge automobile of about 1917 vintage, that belonged to Miss Florence Page, of Euclid Avenue, Willoughby, Ohio. It had been in service in that car since September 1928.

Cross-examination by Mr. McMahon:

The batteries supplied for use in connection with road-building machinery, were the SJR types, a similar type as put in the Studebaker car. This road-building machinery I speak of consists of a road leveler or a ditch digger, some device of that kind used in repairing or laying new roads, whereby the machine itself is transported from place to place through the assistance of the gasoline motor, whereby the operation of the machine in its particular function is also driven by this gasoline motor; that is to say, the machine may be moved from place to place under its own motive power, and when at that place it would be used, the same motor would be used, to drive the machine. That applies particularly to a concrete-mixing machine, which is also one of further uses. The use of that battery

is for starting, lighting, and ignition on this engine used in this machine. A road-building machine might be classed as a tractor. A gas shovel is a shovel that is operated by gasoline motor instead of a steam engine. The battery is used in that for starting, lighting, and ignition purposes on the gasoline motor. The excavator, I think, would be classed as construction machinery in the building trade. A road roller is used to roll a road. I don't know as
81 you can say that is similar to a tractor. That is a piece of machinery of a specific kind.

As to all of these movable machines, such as road-building machinery, tractors, gas shovels, and excavators and road rollers, the propulsion power there, internal combustion engine, is of the same duty requirements, so far as the battery is concerned, as those found on a Studebaker; if the engine was of similar size, it would probably require the same electrical characteristics to start it. If the tests had shown that the requirements necessary were such that it needed a larger battery, we would furnish a larger battery. The same type of battery was removed from a car to the lighting. I said it could have been interchangeable. I said this concern sold a harvesting machine. We tried to get their battery business but could not.

Alfred E. Harrold, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. NORRIS:

I am in the employ of the Willard Storage Battery Company as manager of stationary and railway sales. I have been in the employ of the company since December 8, 1914. My duty is the promotion of sales with relation to stationary engines and railway equipment and other similar fields, for purposes other than use on automobiles. It is not confined to stationary engines; anything except automobiles.

During the taxable years 1922 to 1926, confining my testimony to storage batteries of the type adapted to and used on automobiles, automobile trucks, and automobile wagons, during that period I remember of selling batteries of this type to the American Steel & Wire Company for operating emergency engine stock, for one purpose; also the same company purchased batteries of that kind for operating telephone systems in their plant. The Townley Company, of Muscatine, Iowa, has purchased batteries of that kind for operating calliopes. The East St. Louis Lighting & Power Com-
82 pany at East St. Louis used batteries for oil circuit breaker and control operation; the Dayton Power & Light Company used batteries for the same purpose; the laboratories at Nela Park used batteries for operating potentiometers, microferometers, and micrometer calipers, and for the testing of vacuum tubes and some incandescent lamp test, and also photometric use on lamps. Mr. F. B. Stearns, of the city here, purchased batteries of that type for use on two of his yachts—the "Carmento"—I can't recall the name of

the other yacht; Mr. E. H. Scott, of Erie, Pennsylvania, purchased the same type of battery for use on his boat. Mr. Henry B. Joy, of Detroit, is another customer using them on boats. The Ringling Brothers and Sells-Floto Circus use them in connection with lighting plants for furnishing lights and also for operating kitchen utensils in their camps. Earlier than that I remember the same thing among other operators, but don't recall during 1922–26. For instance, industrial trucks, vehicles, mine locomotives, and work of that character. There have been many of them used on the isolated lighting plants, similar to the Delco, and other uses. I sold them for train lighting and for railroad signals, also for circuit-breaker operation for the Pennsylvania Railroad Company. Sound batteries are used in theaters in connection with any sound pictures. That use I don't believe—I don't know whether that started prior to 1929 or not. Steamship companies used them for emergency lighting and for radio power; they also used them for their intercommunicating telephone systems on board; in fact, for any emergency source of power, in case of the failure of their main power supply they fell back on batteries—telephone bells, enunciators, steering apparatus, compass and rudder indicator, kitchen cooking—galley apparatus they call it. The Interlake Steamship Company and Pioneer Steamship Company used them for operating their fog horns. I am not familiar with sales to the United States Government, the Army and Navy. Other uses were the police and fire alarm systems, city of Cleveland; they have used batteries for that purpose, as well as other cities. Telephone companies, Western Electric, the Associated Bell Telephone Companies, that includes. In Nela Park they use batteries in an experimental way, I know, for electric welding of the filament and the lead-in wires in the lamps. Telegraph, Western
83 Union Telegraph Company use them for regular operation and also for emergency battery supply. I don't recall any railroad switches. I don't recall any sewing machines. Dental engines, though, dental drills. I have sold them for pyrometers—use batteries for that purpose, heat regulating devices. Haulage in mines would be the mine locomotive I spoke of. I don't recall selling any for miners' lamps. Ignition in various kinds of stationary engines is one of the main purposes of batteries on isolated lighting plants, or any stationary gas engine or diesel engine, semidiesel type, any kind of an internal combustion engine. They were used in connection with radio. Broadcasting stations use them in transmitting as well as receiving sets; that is not for emergency purpose but for power supply. That was their regular source of supply during that period, and still is. Ventilating systems on ships—fans, is part of the main emergency requirements on board ships. In other words, if the main power fails the battery is connected to the main buss bars and carries whatever load is on the ship. Any place where power is used on a ship may require the use of the battery. Heating apparatus on a boat that would generally come in connection with

kitchen apparatus and galley accessories. Electric winches on ships used for hoisting, also bilge pumps, winches, or hoists. I have mentioned oil switches on power plants, control buss; that is the same thing. I haven't sold any for crossing signals in connection with railways, personally. I have sold them for train lighting. They are used for draw bridges, but I haven't sold them. In moving-picture machines, that is sound-projection work, as we call it. Electric hoists. For example, Henry B. Joy's yacht, it was used for operating his hoist. They don't use a separate battery for each of these purposes; the one battery supplies for all those purposes. I can't think of any other uses. That selling was all over the United States, through our dealers and by myself personally. I couldn't give any accurate number of such sales.

The COURT. Have you any idea of the proportion that they bear to your total battery sales?

The WITNESS. I would say it was a good proportion of the
84 sales, although it is not as large as the sale for automotive purposes. Of course that is a big field. But I would say they are sold generally throughout the whole United States by our sales organization for that purpose. That has been going on ever since I have been connected with the company.

Cross-examination by Mr. McMAHON:

The batteries used for the various purposes I mentioned requires every size and type the Willard Company have ever made. Simply take a battery that is suited to the load and apply it to that purpose. My answer is limited to the sizes and types used on automobiles. It includes the size, but it is not limited to that.

I cannot give the total number of sales made for each of the purposes mentioned during the taxable period, June 1922, to and including February 1926, inclusive. I just recall that I made sales, but I don't know the number. I am speaking of thousands of sales, thousands and thousands. I cannot bring to this court a compilation showing all of the batteries sold for each of all of the uses I have mentioned. I have no record.

I have a general idea of the sizes of batteries used in connection with automobiles, automobile trucks, and so forth. I have to do with the sales for other purposes besides automobiles. I don't sell them for use on automobiles.

I don't know whether any of the batteries which we sold for other purposes of the sizes and types required for use on automobiles were subjected to tax during the taxable period, June 1922 to February 1926, inclusive.

Redirect examination by Mr. NORRIS:

I can't produce records of the figures of each individual sale because we haven't been keeping records of that kind four or five years, in some cases three years. We destroy records around four to five years old.

Recross-examination by Mr. McMAHON:

Q. In making those sales for uses other than on automobiles, did you make any of those sales for uses—I mean for use as original equipment on any of the list of purposes or uses you mentioned?

The COURT. For instance, in a gas engine, when it was put out did it have a battery in it?

A. No; most of these were replacement battery sales. Well, original equipment might cover oil circuit breakers, yes; but that is something used by itself; it is not in the sense of electrical equipment of a battery on an automobile. It might have been the first battery that they bought for that purpose. In that sense it is original equipment. But I don't think that is your meaning of the word original equipment.

Q. My meaning of the words "original equipment" would be anything sold in connection with the machine or object at the time the object is purchased.

A. Most of these were purchased by the consumer of the article and not purchased for resale.

Mr. Mahon. That is all.

Edwin M. Sutherland, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. NORRIS:

I am the manager of industrial sales of the Willard Storage Battery Company and have been in the employ of that company since 1919. As such manager of industrial sales my duties are the application of storage batteries for any use whatsoever.

I haven't been here since the court has been in session and heard all the testimony, but endeavoring to avoid repeating the uses which I have heard other witnesses testify to and confining my answers to the type of storage batteries applicable for use on automobiles, automobile trucks, and automobile wagons during the period from 1922 to 1926, I have sold batteries, placed batteries upon tractors.

That has been mentioned, I believe. Batteries of that type have been sold for manhole lighting, portable battery. I have seen them sold, seen them used, and sold on Christmas-tree lighting; they have been used in college laboratories, testing laboratories, batteries of the type you have mentioned. They have been used in the cabs of railway cars; they have been used for ignition on speedsters on the railways; I have seen them used for ignition, hot-coil ignition on diesel engines—referring to Fairbanks-Morse.

Q. Making sales for these purposes, were the types of batteries as to which you were testifying equally as well adapted for these other uses as for use in automobiles?

Mr. McMAHON. The Government objects to that question because it calls for the conclusion of the witness, and there is no limitation to the question itself.

The COURT. Overruled.

Mr. McMANON. Exception. The Government also wishes to object on the ground the witness has not shown himself qualified to answer as a technical expert.

The COURT. Answer the question.

Mr. McMANON. Exception.

A. They are equally adapted. In further explanation of my work, we receive a request or an inquiry for an application, we take the requirements of that application, and we take any storage battery which we may have, whether it be automotive or this type, whichever you are talking about, and apply it to the electrical requirements of that system.

(Narrative continued:) I know of the use of storage batteries in connection with radios, radio receiving sets, during this period. The radio receiving sets came into existence, with reference to
87 popular use of it, in 1922, I would say. Radio receiving sets used storage batteries until the production of the A.C. set, I would say in 1927 or '28, first started in. The selling to radio receiving sets was not in my field, although I have done some of that work.

During the years '22 to '26 this type of batteries have been sold quite materially for use on tow boats, especially in semi Diesel equipped tow boats. I remember one sale in St. Louis on a Fairbanks Morse engine, type SJRR, where it was used. That is a type which is normally used on Pierce Arrow equipment.

I worked in an experimental capacity first in putting batteries, of the type common and generally sold and used on automobiles or automobile trucks, on a Renault French tank at the Northeast Plant in Rochester, N.Y., developing the mounting and placing the battery therein.

Concerning pneumatic tools, the Chicago Pneumatic Tool Company has used Willard batteries of that type for a number of years in conjunction with their compressor engines. It would be used as ignition and starting.

I have a recollection as to the quantity used in tractor sales. There were nine thousand, or a little over nine thousand sold to the Moline Universal Tractor Company. That is the same ten thousand Mr. Klug testified to. That was in one year, 1918 and '19. The type of battery sold to the Moline Plow Company was SJR-3 automotive type, six volts. That is a number of years ago, but I believe Brisco people used that same type.

I couldn't give the quantities sold for time clock installation, although sales were made to the International Time Recorder people. Depth sounding devices were not in production at that time, although it is in quit extensive use at the present time. At the present time the type of battery now used for automobile and automobile wagons is the same type used in depth sounding devices. The same types were used in compressors. The types that were applicable and were used in automobiles and automobile wagons in 1922 to '26 were sold

for use upon compressors. I cannot recollect the particular types, although I remember selling and did sell the Chicago Pneumatic Tool Company quite a lot of stuff

Street sweepers was a straight automotive equipment, six volt battery. Traffic signals I am not familiar with.

These sales for these particular purposes were generally throughout the United States.

Cross-examination by Mr. McManus.

I would not be able to tell the number of batteries we sold for each of the specific purposes I mentioned. The batteries mentioned as being sold for tractors, railway speeders, and so forth, in connection with internal combustion engines, were used in those articles or equipment. Part of the batteries I have sold have been for use on in connection with internal combustion engines. I wouldn't say all of the other parts have been used in connection with motors of various electromotive devices. The electromotive devices would have to be explained.

The Court. The court understands that. You don't need to go into that, for instance, a time clock or street sweeper, and so forth.

Mr. McManus. A street sweeper passes a gasoline engine, so it has two general uses, is what I was seeking to show.

(Narrative continued.) The use of batteries on or in connection with the tractor, street sweeper, and so forth, contemplate starting, lighting and ignition purposes.

I didn't refer to mine locomotives.

When I spoke about Pusel engines, and a hot coil, that means they heat the mixture first by means of an electric coil so that it will fire.

M. J. Brennan, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Nomms.

I am employed by the Willard Storage Battery Company as wholesale salesman. I have been in the employ of that company since March 20, 1913. My duties are the selling of storage batteries to manufacturers of various equipments, including automobiles, tractors and marine engines, industrial equipment, and so forth.

Referring to sales of storage batteries during the period 1922 to 1926 of the type adaptable for use and used on automobiles and automobile wagons, practically all the various equipments have been mentioned, but there is the train control equipment. I have sold batteries of that type to the Tesla Company, who made an automatic stopping device for passenger trains, trains of all kinds, in fact, for the railroads. I couldn't give you the quantity. We also sold batteries for Snow Motor Company, a special piece of equipment that was used in the snow country for load operation; and sold batteries for electric welding, six volt batteries carbon welding on metal at that time. All various marine engines and engines that were used

for drilling purposes, where it was just an internal combustion engine but it might be used for mostly any class of work that called for that particular type of engine. I also sold Tecla Company. I mentioned Caterpillar Tractor, for use in caterpillar tractors. The Snow Motor Company, they are since out of business; and all of the marine engine companies, such as Griffith Manufacturing Company, Scripps Motor Company, Wisconsin Engine Company, Hinkley Motor, Stearns Motor Manufacturing Company, Luddington, Michigan, the DeFoe Boat Motor Works, Bay City; Belle Isle Boat & Engine Company, Chris Smith & Son, the Mayo Boat & Airplane Works at Port Huron, Michigan, for use in airplanes. They never really got into the production of airplanes, but that is the name of the company. Their biggest activity is the manufacture of boats, but they did assemble a plane at one time, and one battery would be sold them at that particular time. They are now manufacturing boats. And we sold considerable quantities of batteries to the outboard people for use on outboard motors, at Milwaukee; the Johnson Motor Company at Waukegan, Illinois, the Carlle Motor at Detroit. The Carlle Motor incidentally used storage batteries in some cases for electrically operated weighing machines, and that sort of thing. They make a cable right now. They had special devices they used the batteries on. I remember the Kermath Manufacturing Company. They made marine engines. I remember the Red Wing Motor Company, of Red Wing, Minnesota, which also made marine engines. The Regal Gasoline Engine Company at Coldwater make marine engines in heavy duty type as well as the light type. They also manufacture a lighting plant for which we sold them batteries, the same type of batteries we have, the SLI type of battery for lighting plant equipment. "SLI" means starting, lighting, and ignition. I remember the Wisconsin Motor Manufacturing Company. They manufacture engines for all purposes, not only marine but for some of them are used in tractors, some of them are used in road building machinery. I also remember the Dodge Detroit Steam Motors Company, which manufactured a steam automobile. Didn't get very far. I remember the H. P. Dodge Motor Works, of Detroit, Michigan, very well. They manufacture a boat in which they used engines that were manufactured by others, such as the Lycoming people. They manufactured the boat and purchased the battery for the boat from us. I remember the Gray Motor Company, of Detroit, Michigan. They don't manufacture but they convert automotive types of engines, internal combustion engines of various makes to marine purposes and then sell them as marine engines. The Hinkley Motors Corporation manufacture a marine engine. The Hacker Boat Company, of Mt. Clemens, manufacture boats; they don't manufacture marine engines. They use storage batteries for the SLI regular on the various boats they build. The Buda Company, of Harvey, Illinois, manufacture a line of engines for all purposes as well—marine, trucks, taxicabs,

for road building machinery—the same types of batteries sold to them. The Caille Brothers, of Detroit, Michigan, is a company manufacturing outboard motors, and also recently manufactured an inboard motor, and scales and weighing machines. I refer to inboard and outboard motors with reference to boats. I also sold the Chriscraft Company, manufacturers of boats and also of their own marine engines. The Scripps Company are manufacturers of marine engines; I sold to them, in connection with starting and lighting, starting and ignition of their engine. No lighting, unless the boats they were applied on, or were on, the boats they were installed
91 on by the customers on the engine would have lights, and naturally they would use the same battery. We have had other boat manufacturers since 1915 when I was in Detroit, Michigan, that we sold to, and naturally some of them didn't make a go of it. They were in business for several years and they were out. The Stearn people at Luddington passed out, but they were very active back in 1920, '21, '22, and '23; and there are others that I probably don't recall right now that we sold to that I have not mentioned.

In other years other than 1921 to '26 which I have mentioned, we always sold the type of storage batteries which were then adapted for use and were used in automobiles and automobile trucks and wagons. We just ascertained the size of the engine and what was going to be required of the battery and picked the battery from our list that we make and furnished that battery, whether it was 80 ampere hour capacity or 100, whatever it required. I cannot definitely give any idea as to the quantities of these types of storage batteries sold to any one or all of these concerns for other purposes than automobiles; accumulative. I couldn't quite give it in figures and know that I was right. We don't retain our records beyond three years back.

Q. Remember the court can form no idea of volume. Can you give any correct idea?

Mr. McMANON. Just a minute; the Government objects to that because that calls for a conclusion or a guess on the part of the witness.

The COURT. Overruled. Give me your best idea, not merely a guess—your honest estimate.

The WITNESS. An approximation of seven thousand batteries, eight thousand batteries going to the outboard manufacturers alone last year.

The COURT. Not last year. We are not talking about last year, Mr. Brennan.

The WITNESS. I see.

92 Mr. NORRIS. This is during the period between '22 and '26.

The WITNESS. I couldn't, unless—the total of five years?

Q. I don't care whether it is one year or in all. The court doesn't know whether you sold one battery to one person or whether there were—if you could give some idea of an honest approximation?

A. Just that it was thousands of batteries per year.

(Narrative continued:) I could venture a guess. I haven't any idea what the company did, what our department as a whole. As to our own sales that we made to any one or all of them during the period 1922 to '26, I would say one thousand, fifteen hundred batteries on an average for each of the small boat manufacturers, per year.

We furnished batteries for boats designed particularly for racing during the years '22 to '26. I don't recall any batteries definitely which were furnished as original equipment for speed boats or boats of that character during those years. There probably were.

Q. Mr. Brennan, I show you a photograph marked "Plaintiff's exhibit 11", which is a photograph of this particular battery, and ask you what you know of that particular battery?

A. That particular battery I took out of a lighting plant set. That was a Phillips lighting set, property of Mr. Charles Sleicher, at Philadelphia.

Q. What is a WS-113 type battery?

A. Yes.

Mr. Osmun. Your Honor, we move this testimony be stricken out, as it is not one of the types of batteries involved in this tax action; therefore any testimony is irrelevant and incompetent.

Mr. Norris. I propose to show that this battery is the same battery, subject perhaps to refinement in the art of manufacture, which was manufactured and sold in the period 1922 to '26 for use in automobiles. The life of a battery is so short we can't take a battery which was in use even as late as 1926 and produce it now.

The Court. Overruled.

93 Mr. Osmun. Exception.

Q. I show you a photograph marked "Plaintiff's Exhibit 12", a photograph of a battery produced in court; that also is a WS-113 type battery?

Mr. Osmun. Same objection.

The Court. Overruled.

Mr. Osmun. Exception.

A. Yes.

Q. Where did you get that particular battery?

Mr. Osmun. Same objection.

The Court. Overruled.

Mr. Osmun. Exception.

A. I took that battery out of a Pontiac coupe car.

(Narrative continued:) The battery here produced in court (plaintiff's exhibit 13) is a JRR-26, 12-volt battery. That is a type battery sold during the period 1922 to '26. It was sold for use on marine engines, for automobiles, for various uses where 12-volt battery was demanded. I took this battery from a boat that was powered with an Evinrude 25-horsepower engine. The other battery (plaintiff's exhibit 14) produced, is one used in connection with

an Elto Quad outboard motor, type JRR 26. That was a battery that we furnished to the Dodge automobile. It was the battery I sold to the Caille Outboard Motor. The battery was sold for various 12-volt purposes, and they wanted a low volt battery of that capacity. That was the same battery manufactured and sold during the period 1922 to 26.

(Photographs of said batteries marked "Plaintiff's Exhibits 13 and 14".)

94 Cross examination by Mr. McMahon:

The figures of one thousand to fifteen hundred a year, which I gave as the number of batteries of this type used in automobiles, sold to boat manufacturers, in a year, is just a guess. I have no way of knowing how close I am. I don't mean to convey the impression that I sold to all the boat manufacturers in the United States. I sold to just the specific boat manufacturers that have been mentioned here. Prior to that time batteries of those types had been used in automobiles of the same sizes and types that I sold to boat manufacturers.

The Stearns Manufacturing Company of Ludington, Michigan, is not the automobile company. They manufacture marine engines or isolated plant equipment.

We sell to manufacturers of all kinds. I can give you no idea as to how many batteries we sold per year to all the automobile manufacturers that we supplied the batteries for in original equipment. We had nothing to do with orders received at all. We just merely contract the manufacturer for his entire requirements. We very, very seldom come in contact with the actual purchase orders, so I have no idea of their quantity shipped direct to them. We contract merely to supply them the number of batteries that they demand from us for the period of a year, the types of the batteries that are necessary or qualified to do their work. I can't give you an idea of how many batteries we supplied to manufacturers of automobile trucks, automobile wagons, automobiles, and so forth but our catalogues will give you an idea of the types and the kind of batteries. Defendant's exhibit A is one of the catalogues at that time. We have always had bulletins, before and after this time, or books or some sort of information from which to select batteries. Defendant's exhibit A does not give a list of the automobile companies that we supplied these batteries on as original equipment.

Defendant's exhibit B is apparently a photostat copy of an advertisement of Willard, and it contains at least a partial list of manufacturers to whom we supplied batteries.

95 Defendant's exhibit C is just a copy of another ad, apparently, and contains a partial list of the manufacturers to whom we supplied batteries. I wouldn't be qualified to give you a complete list of the manufacturers of automobiles to whom we supplied batteries as original equipment during June 22 to February, 1926. I contracted for them, but not all of them, only in the

territory in which I worked, and then I am only one of them in there. I presume Mr. Nightingale could supply that information.

Howard C. Negus, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Norris:

My name is Howard C. Negus. I am sales promotion manager of the Willard Storage Battery Company.

Q. Without repeating the uses which you have heard testified to this afternoon, will you be good enough to state other uses of which you know, and as to which you have made sales, of the types of batteries adapted by and used on automobiles between 1922 and 1926?

Mr. McMahon. I think maybe the Government can save some time in this respect. The Government concedes that batteries of the sizes and types used on or in connection with automobiles may be used on or in connection with all internal combustion engines where the duty to be performed is the same as the duty to be performed in the automobile, with respect to starting, lighting, and ignition.

Mr. Norris. Do I understand that you say were used?

Mr. McMahon. I said may be used.

Mr. Norris. Well, the burden is on us to prove they were used. I will take that admission for what it is worth.

96 Mr. McMahon. I could shorten it up for you to that extent.

Q. Will you answer the question?

A. We sold batteries for gasoline logging machines, both rail and portable on skids; sold batteries on speed boats; on power carrier telephones; on portable Western Electric public address systems; for filament supply on remote control panels for broadcasting stations; for hydraulic pumping on barges for pumping water into ponds. Those are all I think of at the present time.

(Narrative continued:) These sales, understand, were made while I was on the Pacific coast, and it so happens those records were destroyed. In some cases the sale of batteries ran over into the hundreds. In the cases of marine boat work, for fishing boats and things of that kind, it ran into several hundred, over a period of three years.

For fire department lighting we have sold the portable type of light which is used at the fire, in which a light is mounted on a handle. That is of this particular type of batteries in this period. We also sold them for a system which is used for sending photographs by wire, such as newspapers use; I sold a set to the Oregon Journal. That was in 1926; I couldn't give the exact month. We have sold them for use in Custer amusement-park cars, and for use in small quantities in toy trains.

I operated a service station for the company from 1925 up until a year ago, 1928, in Portland, Oregon. Service batteries are batteries of sizes suitable for use in automobiles or on radios which are loaned out to customers at a given rate per day. Ordinarily we use the type

which is used in an automobile. Of course there would be various sizes; and those were used both for marine and radio and automobile rental purposes.

Cross-examination by Mr. McMahon:

We sold batteries which we advertised or designated as radio batteries while I was running the service station between 1922 and 1926. Whether such battery is the same as used on automobiles, as far as sizes of plates, thickness of plates, and everything else connected with it is concerned, it depends entirely upon whether
97 it is an A battery or filament battery or B battery. The B battery is an entirely different kind of proposition. We sold two capacities, but they were both radio batteries and designated as such.

Redirect examination by Mr. Norris:

I am familiar with the construction of the radio batteries I have been describing. They have the same plates, the same material throughout as the types used in automobiles; that is; for "A" purposes. They were the SLI battery dressed up and called special radio battery. I don't know the history of the manufacture of the special radio battery by Willard.

Recross-examination by Mr. McMahon:

By the "same plates" I mean the same material, same thickness, same size, same plate area. I have taken down one of these radio batteries. It has the same types of plates. As to being the same number, it depends entirely upon the capacity, the size of the battery. You can use an A battery to start an automobile, but not a B battery. A B battery is a high voltage, high capacity battery. An automobile battery is a low voltage, high capacity battery. In other words, you have a multiplicity of cells in a B battery. The difference in construction between the two batteries that would produce that high and low voltage is just a question of number of plates and number of cells, not necessarily the thickness of the plates; the plate area.

Frank Denzel, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Norris:

My name is Frank Denzel. I am proprietor of the Denzel Electric Company of Cleveland. At the present time my business is
98 electrical contractor and dealer. In 1902 I manufactured electric storage batteries with my brother. We manufactured a battery very similar to those made by the Willard Storage Battery Company, and manufactured principally from their plates. Thereafter we sold batteries of the Willard Storage Battery Company. At the time that the supply of plates ran out that we had purchased in wholesale quantity, at the time that those plates were consumed, then we began to buy separate batteries off the Willard Storage Battery Company, which I should say was about 1905 or '06, perhaps.

We sold those batteries for a good many of the purposes we have heard here today, and some other uses that have not been mentioned. One of the most important ones perhaps was the use of carriage lighting. That was a more extensive business at that time than we perhaps realize now. We had concerns who built coaches, hearses, and ambulances and equipped them with electric light, and we supplied them with the batteries for those hearses and coaches. One of those customers was the Riddle Coach & Hearse Company, of Ravenna, Ohio. Those were Willard make batteries. Another use the batteries were put to, and one even more important, perhaps, in quantity at least, was the use of car signals, electric car signals. We sold those batteries through the Lintern Car Signal Company in Cleveland, to the interurban lines through the eastern half of the United States. They were used for denoting the tail light independent of the trolley wire. In other words, if the trolley came off the tail light remained burning. We sold those batteries from 1902, perhaps, to '07 and '08, or even perhaps a little later than that. In a comparative way I have a recollection as to sales of quantities of batteries of that character. I don't know as I could specify the exact number of batteries sold that way. They were sold through the Newark Company to the interurban lines, to the Cleveland & Southwestern.

The COURT. These sales are previous years so far.

Mr. NORRIS. I consider it my duty to show this was a commercial commodity away back in 1893, and continued uninterruptedly to be a commercial commodity.

99 The COURT. Well, perhaps on that theory. But you must show that these uses continued during the periods involved, I think.

Mr. McMAHON. Or exactly the same batteries without change.

Mr. NORRIS. I will ask that.

Q. Mr. Denzel, what type batteries were these of which you were just speaking, sold in these early years?

A. Those batteries that we manufactured ourselves bore our own catalogue number, of course. However, when we substituted they started with a battery called the "R" type, and this later went through Y and Z types, and later into the "SL" type.

(Narrative continued:) The batteries of the Willard Storage Battery Company in those early days were the "R" type, "R" type battery was a battery similar to that one on the table, except it was in a wood case instead of the hard rubber. I am referring to the battery, photograph of which is mentioned as plaintiff's exhibit 2. The only difference between the type that you see on the table, exhibit 2, and any one of the types of storage batteries which were used on automobiles between 1922 and 1926 was in the connection, the connectors on the top. They had the same constituent parts, they performed the same functions and fulfilled the same duties, the only difference being in the difference in the manufacture of the case and in the connectors.

My business now is that of electrical contractor and dealer. I am not dealing in storage batteries today, excepting in use on a radio. I still sell batteries for radio. I sell Willard storage batteries for radio, and sold them during the years 1922 to '26.

Those batteries that were purchased by us then were sold with sets to the Haas Electric Company, who I understand were the wholesalers for the Willard Storage Battery Company. That battery was similar to the one standing before you, the photograph of which has been identified as plaintiff's exhibit 1. We sold a battery of that type or similar to that—I presume it was that type—for radio.

100 Mr. OSMUN. Your Honor, I move the testimony be stricken out. That type of batteries is not included in the list of batteries which were taxed involved in this action.

Mr. NORRIS. I think we have shown, if the court please, a continuity.

The COURT. Why do you say that, Mr. Osmun—because it was made in 1931?

Mr. OSMUN. No; because it is not of the type battery.

The COURT. I don't understand that; I don't understand it was precisely the type battery on which they paid taxes.

Mr. OSMUN. Not at all. I don't think it has been emphasized enough here in this trial. There was a limited list of types of battery manufactured by the Willard Storage Battery Company on which the Commissioner assessed taxes. Counsel knows the types of batteries.

The COURT. What type was that?

Mr. OSMUN. The type batteries on which the tax was assessed, is that what Your Honor means?

The COURT. I want you to tell me what types you have in mind.

Mr. OSMUN. We have a complete list of types that were taxed: SJR-3, SJR-4, SJR-5, SJR-6, SQR-4, HRG-5, SJR-26, SJR-27, SJR-28, CR-13, and CR-15.

The COURT. Do you claim the batteries here are altogether different in structure and function than those that are designated by these numbers and letters?

101 Mr. OSMUN. Yes. Not as to function, Your Honor, but as to special adaptability to certain automobiles.

The COURT. You can bring that out in your defense. I don't see that you should interfere with this testimony.

Mr. OSMUN. Well, we want to reserve our exception.

(Narrative continued:) Referring to photograph marked "Plaintiff's Exhibit 5", of a battery marked "SJRR-3", we sold those batteries during the years that we sold radio sets; that is, battery-operated sets. I should imagine between '24, '25, and '26, even earlier, perhaps. I am familiar with the construction of that battery. I am also familiar with the construction of battery represented by photograph, plaintiff's exhibit 1. Between those two types essentially there is no difference, absolutely no difference essentially. They are

produced absolutely the same; produce the same duty. I think I have some old batteries of that type in stock in my store at the present time. It is those batteries I sold for radio purposes, identifying this as being the general type.

During the years 1922 to 1926 there was no variation whatsoever in batteries which were applicable for use on automobiles or automobile wagons; the only changes were refinements in minor things, such as connection methods of lugs, such as handle, or something of that nature. It had nothing whatever to do with the function of the battery itself. We sold those particular batteries for use on automobiles. When we sold them for use in radios they were just as adaptable for use on automobiles, except they necessitated a clip to fasten onto these lugs which act as binding posts. The clip is no part of the battery, it is merely a device which the user adopts, according to the use to which he wants to put a battery.

The COURT. Did you sell these batteries for purposes other than radio and automobile purposes?

The WITNESS. Not in the later years we didn't; no, sir. We have in the years gone by; not during the later years.

Q. Not during the year '22 to '26? A. No, sir.

102 Cross-examination by Mr. McMAHON:

Referring to exhibits 5 and 1, by "essentially the same", I mean these two batteries are both in hard rubber containers, so they are alike in that respect. They are both contained in hard rubber containers in a single moulded jar containing three compartments; then each individual cell has a hard-rubber cover exactly the same kind; they have three vent caps; they may be different slightly in design but not at all in utility. They serve exactly the same purpose. The connectors are strap connectors and are apparently lead burned together; the same thing in one battery as the other. The terminals are alike. The only difference I can see in these batteries is one has a metal handle and one has a little hard rubber edge to it to pick the battery up by. Approximately I know what is in the enclosure of each of these cells of plaintiff's exhibit 5. I can't look through the hard-rubber jar, but I should imagine they contained about a seven- or nine-plate cell. I think they each do; I think they are about the same capacity. It is probably a sixty or eighty ampere-hour battery. It is quite possible that in plaintiff's exhibit 1 there are 13 plates instead of nine. That would make a difference in capacity; it would increase the capacity. I have no way of knowing that was nine plate, eleven plate, or thirteen plate. [After examining plaintiff's exhibit 1.] It is thirteen plates per cell. During the years 1922 to '26 I sold radio batteries that were made by this company. I sold those as original equipment on radios. Those batteries probably had either eleven or thirteen plates. As a seller of those batteries I had very little occasion to open them up, and that is the only way I could tell. Radio batteries were sold on capacity, either sixty-eighty, hundred and a hundred and twenty ampere-hour

and so we gauged the battery rather by that instead of the number of plates it contained. I don't know how many plates in a 120-ampere-hour battery unless I know the size of the plates. Some of them were 120 amperes; some of them 100 and some 120. I don't know anything whatever about the sizes or thicknesses of the plates that were in those radio batteries.

103 William E. Bender, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. NORRIS:

My name is William E. Bender. I am employed by the Willard Storage Battery Company and am manager of the Cleveland branch store of that company. I come in contact with the users of storage batteries which we sell. I sold batteries during the years 1922 to '26. The batteries adaptable for use and which were used in automobiles, automobile trucks, and automobile wagons we sold for intercommunicating 'phone system, marine use, radio use. That is during '22 to '26. Oil switch pumps, emergency light. That is all I recall now. In addition to that some of the other uses to which some of the other witnesses have testified. We sold for radio purposes during those years. The AC tube didn't come into existence until '28, I believe. All home radio receiving sets required two batteries, one for filament and one for power. There were quite a number of the "SLI" batteries sold for use in radio sets, as to the individual consumer. There was likewise quite a number of them sold to the various radio dealers, such as department stores and small dealers handling radio sets. They were so constructed that a bale handle could be applied to the "SLI" battery for easy carrying.

The WSB-13 type Willard battery shown me was manufactured and sold during the latter part of—I think it was '26; I think it was during 1926. The apparatus now shown me is the bale handle of which I spoke. That fits into a hole in the battery case. That is the way it was used for radio purposes. There were a lot of cases where the ultimate consumer bought a battery like that and made it interchangeable in his automobile. For instance, the man who owned the car, who had an "SLI" or radio battery, and would use the extra battery on his radio set. When that was discharged from the use on the radio it would then be installed in the automobile and charged from the generator, and vice versa. There were quite a number of instances of that sort, of interchangeable use.

104 During the period in suit, 1922 to 1926, we sold a number of batteries adapted for use and which were used in connection with automobiles and trucks for intercommunicating phone systems in apartment houses and with that we sold a colloid rectifier. That was a rectifier manufactured by the Willard Storage Battery Company for charging "A" batteries, and they would rectify the battery itself after use on intercommunicating service and would charge it by means of this rectifier.

Q. Were the batteries which you sold for use in connection with automobiles and automobile trucks during this period and which

were adaptable for that use, were they equally as well adaptable for the other uses which you mentioned?

Mr. McMAHON. The government objects to that for the reason this witness is not qualified as an electrical expert. There has been no foundation laid as to the specific construction of the thickness of the plates, and so forth. It is also calling for the conclusion of the witness, and it is usurping the power of the court.

The COURT. Overruled.

Mr. McMAHON. Exception.

A. Yes, sir.

Q. Was there any distinguishing characteristic on any of the batteries which you sold during this period adapted for use and were used on automobile trucks and automobiles, which made them adaptable primarily for that use only?

A. No, sir.

Q. You have stated they were interchangeable in use?

A. Yes, sir.

Cross-examination by Mr. McMAHON:

I would say during the year 1926 there was approximately 1,200 batteries sold to radio dealers and department stores for use as radio batteries. There was several hundred sold to individuals for use on radio sets direct, not only in our own station but all over the
105 city. I would say there would be many hundreds. I am talking about Willard storage batteries. I supervised the sales in these other stations. I could not tell today the exact number of batteries that each of those stations sold.

The advent of the automobile was considerably before the radio. The handle would serve very nicely on an automobile battery if we had one adapted for that use. I did not intend to convey that the handle used on a radio battery was not adapted for automobile use.

I couldn't answer how many of these interchangeable cells for use on autos and radios, interchangeably, we made from June 1922 to December 1922; neither could I answer as to '24, '25, or from January to February '26.

When they took a rundown battery out of the radio and put it in the automobile, they did that chiefly to charge it off the generator. It might have sufficient current to start the automobile with. If it was run down, it could be half charged—half discharged. I don't know whether it had sufficient current in every case.

Q. Does the battery have the same duty to perform with respect to a radio as it does with respect to an automobile?

A. No, sir.

Q. Is the duty of a battery, with respect to a radio, greater or smaller than the duty required of a battery with respect to an automobile?

A. Smaller.

(Adjournment taken to the following day, whereupon at 9:30 a.m., Friday, May 15th, 1931, the trial was resumed.)

Robert S. Van Cleve, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. NORRIS:

My name is Robert S. Van Cleve. I am employed by the Willard Storage Battery Company as development engineer, western industrial sales manager, and radio sales engineer. I have occupied that position since 1925. Beginning with 1912 I was affiliated
106 directly with radio applications. Between '18 and '19 I was chief radio operator for the United States Navy. Between 1919 and 1920 I was assistant district manager of the Hoover Suction Sweeper Company, and after '21 I was manager of the Selzer Electric Company, manager of the electrical department. Between '22 and '24 I was sales manager of the Radiovox Broadcasting Station WHK, city of Cleveland. In connection with my various duties, I am familiar with radio broadcasting and radio receiving and am familiar with the apparatus used in both those services.

During the years 1922 to 1924 radio receiving sets were all DC sets, requiring the use of storage batteries. They became less general in use in 1927 because of the invention of the AC tube.

I am familiar with the types of storage batteries of the Willard Storage Battery Company which were applicable for use and are used in connection with automobile trucks, automobile wagons, and automobiles. Such batteries are applicable to the A battery of a radio receiving set, known as the filament or heating battery. The storage battery of that character is not applicable to the B battery. I speak only about the A battery with relation to these receiving sets.

I was engaged in the business of selling radio supplies from 1921 until 1925, when I entered the employ of the Willard Storage Battery Company. During that period, in connection with that business, I sold storage batteries of the Willard Storage Battery Company of the type used on automobile trucks, wagons, and automobiles for use on radios. The volume in units was probably in the neighborhood of about 500 batteries per year, as near as I can recall it.

I also dealt in other supplies which were used in connection with home radio receiving sets, in connection with storage batteries. Perhaps the most outstanding use of a supply other than actual radio was the clips that we had to purchase and use for converting the application of the automobile battery for radio, as it were. We used a large number of those clips known as the Mueller clip. Those clips were not part of the storage battery; it was a device used to connect the circuit with a storage battery. The Mueller clips were
107 a metal spring device with teeth that clamped over the post of the battery. They were used to adapt the Willard storage battery to radio uses, because the battery at first had a straight post and could not be connected to a radio circuit without a clip. During the years '22 to '24 we purchased the clips in units of one thousand. During those years our turnover was approximately six

times per year, which would work out about six thousand clips per year. Two of those, of course, are required for each battery.

Beginning in 1925 I was employed by the Willard Storage Battery Company and my business was to promote sales in the radio field particularly to the broadcasting stations. Referring to the use of the storage battery of the type applicable for use and which were used on automobiles, automobile trucks, and wagons, of the Willard Storage Battery Company, the type of battery known in our language as the "SLI" battery was used primarily to supply filament current to the speech in putting amplifiers on these broadcasting stations, and to the remote control amplifiers. That battery was then, and is today, a twelve-volt type, a six-cell battery, which is used primarily for starting motor cars, such as the Dodge, the unit systems such as the Dodge type.

I made the first installation of the so-called "SLI" type batteries for the first broadcasting station in the city of Cleveland, station 8ACS, and then WHK. After I entered the employ of the plaintiff I sold these type batteries to other broadcasting stations throughout the United States, to some 54 different stations. The number of batteries which a broadcasting station required depended on the number of units for remote control which they had. However, the average was about two of those batteries for use and two for standby. The batteries usually lasted about a year. I should say we sold probably two hundred, three hundred of them for that specific purpose to each station. This is to broadcasting stations.

It was part of my duty after 1925 to develop the sale of Willard storage batteries of the so-called "SLI" type among airplane service. The types used in airplane service varied. However, use was made of the same type battery that we have just discussed that was used in broadcasting service, and that was used to light
the landing lights, the navigation lights and instrument
108 lights, and to start the electric inertia starter on the airplane.

During the years 1922 to 1926 the "SLI" batteries were used particularly for the lighting of farms or farm light applications; for the use as an interchangeable unit for motor car and radio, where we had a number of customers who would buy the same type battery for their radio which they are now using or were then using in their motor car, and used that battery until it had been discharged below an operating point for radio, and then place it in the motor car and recharge it, using the one that was then in the motor car to operate the radio set. For marine use on vessels from thirty feet down, some larger; for depth sounding equipment. We used some of them at times for special applications in the Navy, and in a few instances for gun firing.

Q. During the time since 1925 can you form any conservative estimate of the proportion of "SLI" batteries sold by the Willard

Storage Battery Company of the "SLI" type which were used for radios?

Mr. McManus. The Government objects to that for the reason it calls for the conclusion of the witness. There is no showing with reference to the testimony of this witness of the use on radios that the duty requirements are the same.

The Court. He may answer the question.

Mr. McManus. The Government excepts.

A. I can approximate that. It is rather difficult to give an absolutely definite figure.

Q. Please be conservative.

A. I should say from ten to fifteen percent, perhaps a little over that.

Q. Mr. Van Cleve, were the "SLI" type batteries of the Willard Storage Battery Company just as adaptable for use in connection with radio as they were for automobile?

A. Yes, sir.

Mr. McManus. Just a minute. The Government objects.

The Court. You may save your point.

Mr. McManus. The Government preserves its exception.

A. Yes, sir.

Cross-examination by Mr. McManus.

The batteries which we sold for use in connection with airplanes, starting the motor and lighting the landing lights, and so forth, have the same type of vent plug as the battery used in an automobile, in every instance except in the last few months, where there has been a different type of vent plug developed, but not a nonseepage; it is merely to eliminate the spray of acid, fumes and so forth while the battery is on charge. The advent of the automobile was prior to the advent of the airplane.

If you consider it mechanically, the duties required of the particular batteries sold for use in radios were the same as the duties required of that particular battery for use in automobiles. If you consider it in the general application, the function and requirement was to deliver current at a definite potential. Considered in the general application it was precisely the same. The duty is not the same from the standpoint of starting, lighting, and ignition. There is a lighting filament and vacuum tube. The duty is otherwise the same.

I took that into consideration when I answered the question in which I stated that the battery was just as adaptable; it is just as adaptable.

Leonard G. Baldwin, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Morris:

My name is Leonard G. Baldwin. I am not now employed by the Willard Storage Battery Company. At the present time I am with

the Transitone Automobile Radio Corporation. I left the Willard Storage Battery Company on March 1, 1930. I was employed there from October 1, 1917, to March 1, 1930. Between 1922 and 1926 I was manager of radio sales. My duties were to make sales entirely through radio channels.

Starting in 1922 we developed what we thought at that time was required by the trade, a special radio filament battery of heavy plate construction, a special case construction, and special handle construction, a very as it turned out afterwards to be expensive battery. Later on, a year later, we found that competition was using a standard starting and lighting construction for radio purposes at a much lesser price than our standard radio battery. As a result we then went to standard starting and lighting construction, the size of the case being similar, inside construction identical; the only difference being that we placed the name "radio" on the case and a special carrying handle. Later on we found that Willard service stations throughout the United States, through disassembling the battery, had found it was nothing but starting and lighting construction, whereas we had for merchandising purposes undertaken to put across the story on the service stations and to the public that it was a special battery. Immediately we found that our sales in what we were trying to put across as a special radio battery had dropped off, and that the public and Willard service stations were taking and using standard starting and lighting batteries by adapting a special attachment so that it might be properly hooked to radio sets. The reason for this was twofold. One was that it could be purchased considerably cheaper than the radio battery; the other was that the Willard service stations were not required to carry two lines of stock. Later on we then used identically the same case, the same identical battery as we were furnishing for starting and lighting purposes, leaving only a hole in each end of the case. It made no difference in manufacture whether that particular case was for starting and lighting purposes or for radio purposes; and furnished to the service stations a handle and a clamp that might be adapted to that particular battery, identical in every way except the handle, with the same battery that we were selling for starting and lighting purposes. In the course of my employment I went all over the United States visiting dealers and persons who sold directly to the consumer, and broadcasting stations, for the purpose of ascertaining the use of batteries in connection with radio receiving sets and broadcasting sets, increasing our sales.

In the course of my employment and for the purpose of developing the field of radio use of storage batteries of the "SLI" type, I made two surveys. One was a single survey through the State of Iowa; another was a nation-wide survey. The Iowa survey was either in 1923 or 1924. I cannot say which of those two years. In 1922 I started on a particular survey, going throughout the United States, coming back and making a report to my company of what I thought that we needed in the way of radio batteries. Continually

year after year I made minor surveys. Probably fifty per cent of my time was out in the territory. 1922 was the year that the general public commenced to get some idea of radio, and radio became popular in use.

Along with a number of other manufacturers of radio sets and radio batteries, I went with the Meredith Publication representatives for a period of five days throughout the State of Iowa, to find out generally what the farmer was using. This survey was in the rural communities. We found that without exception it was a starting and lighting battery, and dry B batteries; it developed that in rural communities we didn't have any market for the B battery; but there was a market for the A battery. Instead of using the radio battery we found that the farmers were using starting and lighting batteries in two ways; that some farmers had two batteries and that weekly or semiweekly, depending upon the use, the length of hours they were using their batteries, they would take the battery out of their automobile and place it in the house attached to the radio set, and when that battery had run down to a certain extent that was then put back into the automobile, and the one that was in the automobile was then replaced in the house. We also found that where the farmer either could not afford or did not have two batteries in one particular instance or another, that we were told that the farmer would run the wires from his set out the window to his automobile, using the automobile or starting and lighting battery without removing it from the car, for lighting the vacuum tubes of his radio set. At that particular survey we did not form any estimate of the quantity of so-called "SLI" batteries which were used on radios in the State of Iowa, except that I came back with the report that in rural communities the farmer was using his automobile or starting and lighting battery for radio use.

With reference to the other surveys which I made during the years 1922 to '26, I reported to my employers that one out of every five batteries on charging lines of Willard service stations were starting and lighting batteries which had been adapted to radio purposes. By "charging lines", meaning the lines in the shops of dealers who came in contact with the consumers for recharging batteries.

Referring to the sale of Willard "SLI" batteries to the United States Government during the war, and their use after the armistice, I have in mind a particular instance, which I presume is the one you refer to, in which a duplicate shipment of starting and lighting batteries was made to the Government to be shipped to France. The original shipment was lost and was duplicated. Some time, probably four years, possibly five years after the armistice, this lost shipment was found, and my employers were asked if they could use the batteries. Due to their age they told the Government they could not use them. As a result they were purchased by a firm in Boston and generally advertised as adaptable for radio use. Because of certain advertising appearing in Chicago papers of Willard radio batteries at prices below those at which Willard dealers could sell bat-

teries, and because of the complaints, I made a trip to Chicago and found on State Street some forty or fifty of these starting and lighting batteries on which had been placed the right kind of connections for radio use, and these were the batteries that were being advertised as radio batteries. They were entirely of the "SLI" type.

During the period 1922 to 1926 I was chairman of the storage battery committee of the radio section of the Associated Manufacturers of Radio Supplies. That association consisted of manufacturers of electrical equipment, including storage battery manufacturers, and radio manufacturers, and having to do with the use of storage batteries in connection with radios, and in a broader sense it had to do with all electrical equipment in connection with radio use. However, I was interested only in the storage battery end of it.

113 I was chairman of that committee, as representing the Willard Storage Battery Company, but all storage battery manufacturers.

In the course of my duties as chairman of that committee, for the purposes of the committee, surveys were continually made in cooperation with the Department of Commerce of the Government, as to the number of radios in use throughout the United States, and in 1925 and '26 it was estimated there were between five and six million radio sets in use. Probably 75% of those sets used storage batteries. That was prior to the advent of the AC tube set.

I know that it was quite common to advertise "SLI" batteries for radio use. I have in mind very large banners which the Ford Manufacturing Company displayed in their sales agencies throughout the country, in which they called attention to the public that the batteries were for automobile and radio purposes. I have made an effort to procure one of those banners. They were used, I would say, during 1924, 1925, and 1926. Plaintiff's exhibit 15, to the best of my recollection, is a correct photograph of the banner used during the years I have just mentioned. I know that these banners all referred to the use of batteries for radio purposes.

Mr. Norris. Identify that as plaintiff's exhibit 15, and for the purpose of the record I call attention to the fact there appears the wording: "Ford batteries—ideal radio 'A' battery." I offer in evidence plaintiff's exhibit 15, and I also offer in evidence paper which is marked "Plaintiff's Exhibit 16."

(Said plaintiff's exhibits 15 and 16 are attached hereto and made a part hereof.)

(Narrative continued:) The spring clip with small teeth at the end is the type of clip that was used in the early days of radio to attach to the posts of a "SLI" battery for radio use. That may be a Mueller clip; there were several manufacturers of the same kind of a clip. These are not part of a storage battery. The clip now shown me has a bolt and nut to fasten the device to the post, with a wing nut for the purpose of attaching a wire, and also a type of terminal connector used in applying storage batteries, which were

114 applicable for use in automobiles and automobile trucks, for use in radio.

I am a member of this bar.

The COURT. Are you putting the clips in?

Mr. NORRIS. If by agreement I can substitute photographs after this case, I would like to put them in evidence. They are fairly material.

Mr. MCMAHON. You may offer them in evidence and substitute photographs without objection on the part of the Government.

The COURT. They will be 17 and 18.

Mr. NORRIS. The Mueller clip will be plaintiff's exhibit 17.

(Plaintiff's exhibits 17 and 18 are attached hereto and made a part hereof.)

Cross-examination by Mr. MCMAHON:

I would say the duty requirement of a radio is the same as the duty requirement of an automobile to the point of furnishing current, not beyond that point; there is a difference.

Defendant's exhibits D, E, F, and G are lists of starting and lighting batteries with consumers' net prices. They have on here the dates of 1921, 1923, 1924, and 1925. These exhibits D, E, F, and G contain a representative list of the "SLI" batteries which I mentioned as having been sold for use on radio.

Redirect examination by Mr. NORRIS:

These price lists I have just identified are price lists in connection with the catalogue or bulletin no. 136, identified as "Defendant's Exhibit A", and marked "Electric Storage Batteries for Automobiles, Motor Boats, Tractors, and Trucks." These price lists changed from time to time during the years '22 to '26.

115 Leonard J. Lechner, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. NORRIS:

My full name is Leonard John Lechner. I am a dealer in electrical and automobile supplies, incidentally selling the batteries of the Willard Storage Battery Company, of the so-called "SLI" type for use in automobiles and trucks. My place of business is in Berea, Ohio, and have been there for 15 years.

During the years '22 to '26, other than for use on automobiles I have sold the "SLI" batteries for radio batteries and starting of tractors and electric clocks, and for lighting purposes in residences. Also in hospitals and laboratory work, experimenting in laboratory work. I had a number of those "SLI" batteries in stock, as we all did, to rent for different purposes. I rented them for automobiles and for lighting and for operating of moving-picture shows, also for radios.

Cross-examination by Mr. McMAHON:

We sold the most of the "SLI" batteries for automobile use.

C. C. Schellentrager, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. NORRIS:

My name is C. C. Schellentrager. We are distributors of Willard storage batteries for eastern Cuyahoga County. We sell both to consumers and other service stations. I have been in that business 11 years.

During that time I have dealt in all types of batteries, including the "SLI" type battery. For other purposes during the years
116 1922 and 1926 the "SLI" type batteries of the Willard Storage Battery Company have been used in intercommunicating systems in large buildings. They were sold for intercommunicating systems in large buildings, the operation of electric clocks throughout public buildings, the large buildings, the lighting of remotely situated dwellings and club houses; for ignition purposes on stationary engines; sold in some cases where they would be used for welding purposes, to furnish current for that purpose; to operate relays on oil switches; for radio purposes, and of course in automobiles during the same period.

As to what an oil switch is—some of these heavy current carrying circuits, when the switch is open the arc is rather large, so to quench the arc and prevent it from causing damage either to a person operating the switch, if it is operated by hand, or causing a fire or property damage, they have a relay which is operated by current of low voltage which the battery operates, and when that relay closes the battery operates the magnet and opens or closes the switch. The arc or points of contact of the switch are enclosed in a container filled with oil which prevents the current arc from doing any damage.

During the years 1922 to 1926, the percentage of the total sales of the so-called "SLI" type batteries sold for use for radio and other purposes, other than for use on automobiles and automobile trucks, I would say, ran forty percent, possibly higher. That is more or less of an estimate.

Cross-examination by Mr. McMAHON:

The duty requirements of a radio are basically the same as the duty requirements of an automobile. They are both an electrical apparatus which require a current. Electricity is the same in any form or shape. You do not have a turning over of an internal-combustion engine in connection with the operation of a radio. It is relatively different in that respect.

I would say we have possibly twenty public buildings in our trade territory. During that period I know of none of those buildings

which used the "SLI" batteries for lighting purposes. If I remember correctly, during that period we had batteries in five of them for use for clocks.

117 The principal or chief use for which we sold Willard "SLI" batteries during the period 1922 to 1926 would be for automobiles.

We had two of those peculiar switches in our territory that I know of.

L. W. Leonard, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. NORRIS:

My name is L. W. Leonard. I am operating a retail service station, Willard service station in East Cleveland, and have been in that business nine years. In the course of my business in this service station I have been selling the Willard storage batteries of all kinds to various users, including the types which are applicable for use and used on automobiles and automobile trucks.

During the years 1922 to 1926, I furnished batteries to the Cleveland Clinic for laboratory purposes, running different machines, and furnished the East Cleveland police signal system with storage battery. Some of the new apartments on Chapman Avenue were furnished with batteries for bell ringing. Sold one battery for preignition on an oil motor, and then I have sold radio batteries, sold for radio batteries, and I have only furnished one for a mechanical toy. I furnished a battery to the Austin Company for their crane. I believe it was a SJRR-26. It was a twelve-volt battery. I remember selling for toy motors. I have used it for an odd use of lighting a fishing line, a signal telling when a man had a fish on his line. I have furnished "SLI" batteries for motor boats. In fact, in the peak of the radio season in our business, fifty percent of our "SLI" batteries were used for radio purposes. I mean peak of the season when they were using battery-operated sets; that is, I would say '24, '25 and '26, in the winter of '26; that is, the winter was always our biggest business, and those years our radio business overcame our other uses.

118 Cross-examination by Mr. OSMUN:

I sold storage batteries only. Mine was a storage battery service station. We service any kind of storage battery for any purpose. We do not classify our batteries for automobile or anything else. We have storage batteries, and they come in blocks—six, twelve, twenty-four volts. A man comes in and asks for a storage battery; we fit the storage battery for the purpose he wants to use it.

The duty requirements of a radio are not the same as the duty requirements of an automobile truck or automobile, only they use current. They are the same battery. The requirements of both is to furnish power. If it is a six-volt battery it is the same for radio as it is for an automobile; a battery, if it is using six volts, a radio set is using six volts, they both furnish six volts.

Redirect examination by Mr. NORRIS:

To a certain extent I am familiar with the automobile radio as to which Mr. Baldwin testified. It is a radio set attached to the automobile.

I furnished the batteries for the East Cleveland police department. On some cars the "SLI" battery on the automobile also operates the radio, some of them we use a separate battery, because just in the past year or so they made it so you could change it over. But they use in their cars the same—we sold them the same type battery for their Ford cars as we did for the radio; and the reason we did this is because they had to have two batteries for every car and consequently they were operating three or four cars and that meant quite a few storage batteries, and they couldn't keep them separated. So they were used—sometimes they would be used in the back of the car and for the radio, and next time they might go into another car for starting and running the automobile; but they always bought the same type of battery because they were interchangeable.

Mr. NORRIS. If the Court please, by permission, I would
119 state—I intended to ask Mr. Baldwin to describe it—the Transitone Automobile Radio Company manufacturers a radio set which is attached to the automobile, and the same battery which operates the automobile also operates the radio set, and that the radio set is operated while the highest duty, the cranking duty is being performed in the automobile.

The COURT. What type battery is it?

Mr. NORRIS. It is "SLI" type battery, original installation in the automobile.

Recross-examination by Mr. MCMAHON:

The automobile was first. The advent of the automobile radio has just been lately. The first one I recall is about three years ago.

Wayne W. Parsons, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. NORRIS:

My name is Wayne W. Parsons. I am operating a Willard service station, distributing batteries in the northern part of New York State, and have been in that business approximately eight years.

During the period 1922 to 1926 I sold to users of storage batteries the batteries of the Willard Company applicable for use and used on automobiles and automobile trucks and wagons. I sold only Willard batteries. We sold "SLI" type Willard batteries for use in radio sets and for marine operation in power boats; for lighting plants; we sold some for signal operation in schools, and some for road machinery operation. I would say about ten percent of our business represented sales for use in motor boats.

120 Cross-examination by Mr. McMAHON:

The duty requirements of a radio set are the same as the duty requirements of an automobile in that they both require current from the battery. Beyond that point they are not the same.

In speaking of road machinery I refer to road machinery using a gasoline motor. These batteries were used for starting and lighting purposes and ignition. I include in that category these big automobile type trucks. The lighting plant does not have the same duty requirements as the automobile, except they both require current from the battery.

Charles E. Haas, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. NORRIS:

My name is Charles E. Haas. I am a proprietor of the St. Lawrence River Motor & Machine Company, which is also a Willard station, at Clayton, New York. I have been in that business about 22 years.

During the years 1922 to 1926 I sold Willard storage batteries applicable for use and which were used in automobiles and automobile trucks, and also for other purposes, such as for marine purposes and radio. During the years 1922 to 1926 about seventy-five percent of my business in the sale of "SLI" type of Willard batteries was for other use than for use in automobiles and automotive trucks. They were used principally in the motor boat fields, marine and the radio.

Cross-examination by Mr. McMAHON:

We run a machine shop, marine hardware. We sell Dodge boats and marine engines. A radio and an automobile use the same current. They are not the same beyond that. The automobile requires more current at a time.

121 Redirect examination by Mr. NORRIS:

The use on motor boats is for starting and ignition of an internal-combustion engine. The duty is the same to start an internal-combustion engine on a motor boat as to start an internal-combustion engine upon an automobile.

Recross-examination by Mr. McMAHON:

The duty requirement of a specific size of internal-combustion engine in a motor boat is the same as the duty requirement of the same specific size of internal-combustion engine in an automobile. On some occasions the duty requirements as to lighting in use in a motor boat are the same as the duty requirements as to lighting in an automobile. Some boats have thirty-two volts and others have six and twelve. In other cases they are not the same.

Walter S. Bailey, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. NORRIS:

My name is Walter S. Bailey. I live in New Rochelle, a suburb of New York City. I am sales manager of Motor Boating, a magazine published to increase the interest in use of boats. It is the largest magazine in its field. I have been in the present position for a little over twelve years, as sales manager. I have been in the employ of Motor Boating magazine for 20 years.

I am asked the question frequently as to the number and kinds of motor boats in use in United States and the apparatus used in connection with them. During the years 1922 to 1926 I made surveys and furnished estimates for the use of Motor Boating magazine as to the number of motor boats in use in the United States. We have always had an estimate every year to meet questions that came up.

This estimate is increased from year to year as the number of
122 boats increased. In 1924 we figured there were about 700,000 boats in use in the United States; for 1925, 750,000; for 1926, 800,000.

We were familiar with the use of batteries for different purposes on boats. During the periods '22 to '26, we used automobile-type batteries on motor boats; the same batteries that were made for automobiles.

I have made an estimate as to the number of batteries used on motor boats of type applicable for use and used on automobiles, automobile trucks, and automobile wagons. I should say that the number of batteries used in 1924, 700,000 motor boats was the equivalent of 850,000 automobile batteries; as to the year 1925, perhaps 375,000 batteries; and for the year 1926, 400,000 batteries.

Cross-examination by Mr. MCMAHON:

I do not mean to say the 350,000 batteries were used in motor boats during the year 1924 were Willard batteries, nor as to the 1925 or '26 estimates, that they were Willard batteries. There are all makes of batteries on the market.

The motors used in these motor boats in which batteries were used are very similar to an automobile motor in general design, but there are certain differences in them that make them more durable motors for marine use, and on the whole they will average larger in size than automobile motors. They will compare more with trucks for the larger size boats and fast boats. The duty requirements of those large marine motors are if anything a little more difficult on a boat than the requirements of the lighter automobile engine.

Irving K. Schnaitter, a witness called by plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. NORRIS:

My name is Irving K. Schnaitter. I am a member of this bar and assistant treasurer of the Willard Storage Battery Company.

I did not make the computation of the excise taxes which
123 were paid by the Willard Storage Battery Company during the years '97 to '98, but I had supervision of the payment of the tax, under my department. I paid no taxes upon storage batteries sold by the Willard Company to manufacturers of automobiles. As to paying taxes and making a return upon storage batteries which were sold directly by the company to other persons for other uses than for use in automobiles, if they were used for manufacturing and were exempt by the revenue act, upon the presentation of an exemption certificate, we paid no tax upon it. The balance of our product was sold to jobbers, electrical concerns, and dealers for resale by them. All the rest of our product was sold to those persons I have previously described. It was upon those sales we made our return for taxation. Dealers are persons who distribute or sell our storage batteries directly to the consumer, such as Mr. Hane, who was on the stand a moment ago, and Mr. Schoenberger, who was also on the stand.

During the years 1922 to 1926 the number of dealers the Willard Storage Battery Company had contracts with would run somewhere between three thousand and thirty five hundred. We also had our own operated service stations, approximately sixteen or seventeen, during the period '22 to '26. These were very well scattered throughout the United States. The dealers were also located widely throughout the United States; it was our endeavor to cover the entire country.

Cross examination by Mr. McManus:

Defendant's exhibit A is a copy of a bulletin, No. 130, which was issued by our company.

The Court. They have already been identified, haven't they?

Mr. McManus. I was just going to identify them for one purpose. If he will say this is all advertising in magazines, catalogues, and bulletins put out by his company for the periods indicated thereon, I will ask him one question and then I am through.

The Court. Well, is that correct, Mr. Schmajtter?

124 The Witness: I haven't looked them all through yet. The balance of these exhibits seem to be photostatic copies of advertisements or catalogues that were issued by our company.

(Narrative continued:) I can't answer the question as to whether those exhibits contain the lists of "SLI" batteries upon which the plaintiff paid tax. It contains in addition the lists of manufacturers to whom we furnished batteries.

Redirect examination by Mr. Norris:

As to the price lists which accompany our catalogues, the identification of the batteries by letters indicates the batteries on those particular price lists for that particular time when the price list was promulgated. We changed the designation from year to year on an identical battery. During the period of 1922 to 1926 there was a con-

stant change of designation for our own purposes; but the batteries were the same.

Mr. Nomis. Mr. McMahon, we made call for the production of a letter in the month of May 1919 accompanying the first payment of taxes. Can you produce that letter?

Mr. McMahon. I cannot. You mean the call for the letter written?

Mr. Nomis. In accordance with the notice dated May 9, 1931, to the United States district attorney at Cleveland, calling for the production of a letter written by the Willard Storage Battery Company, addressed to the collector of internal revenue, Cleveland, dated on or about May 5, 1919, accompanying the delivery of check no. 15846, dated May 1, 1919, payment of excise tax upon batteries sold for the month immediately preceding. Can you produce that letter?

Mr. McMahon. The Government has made diligent search 125 both in the files of the collector and the files of the Bureau, in Washington, and is unable to find either the return or the letter. Such return has probably become lost or destroyed under the statute return and letter.

Mr. Nomis. I offer the letter as plaintiff's exhibit 19.

Harry J. Stiles, a witness called by plaintiff, being first duly sworn testified as follows:

Direct examination by Mr. Nomis:

I am treasurer of the Willard Storage Battery Company and was such in May, 1919. I personally made payment of the check which represented the excise tax under the act of 1918, upon the sales price of storage batteries sold by the Willard Storage Battery Company during the preceding months. I made that payment at the offices of the collector of internal revenue on the lower floor of this building at Cleveland. As I remember it, there was several cashiers, and there was one particularly, I think, near the personal office of the collector of internal revenue, where it had a notice up, "Pay excise taxes here." So there is where I presented a certified check along with the statement of the taxes in duplicate, and also a letter, and at the same time of handing the documents in to the cashier, I stated that we were paying those taxes under protest. Mr. Schnaitter, my assistant, assistant treasurer at that time, accompanied me. He is the assistant treasurer who just testified. The check I presented to the cashier was the first payment of excise tax upon the sale of storage batteries. As to whether the sales on which the tax was assessed and collected was for the month of April 1919, it was the first payment we made, the first payment necessary under that date. I think I could prove that further, though. I have a receipt.

Mr. McMahon. The Government concedes it was April 1919.

126 Cross-examination:

By M. McMahon. I think Mr. Weiss was the collector to whom I made that payment, but we paid it to the cashier.

Mr. Norris. If the court please, I offer in evidence publication of the Department of Commerce, dated October 6, 1924, exemplified under the act of Congress, called "Recommendation for Regulations of Radio, Adopted by the Third National Radio Conference", for the particular purpose of calling attention to the number of radio receiving sets in the United States, 1922 to 1923 1924, as plaintiff's exhibit 20. I also offer in evidence as plaintiff's exhibit 21 a publication of the Department of Commerce, dated May 4, 1931, exemplified under the act of Congress, drawing particular attention to page 291, which lists the number of tractors purchased during the years 1922 1930. I am asked to state and do state these documents are presented for the purpose of showing the numbers of radios generally, not that these radios use Willard storage batteries. I also offer in evidence a statement of the Department of Commerce, as plaintiff's exhibit 22, containing no date as to its promulgation, certified under the act of Congress, setting forth a compilation of licensed motor boats by the United States for the years 1919 to 1930, inclusive. I also offer in evidence as plaintiff's exhibit 23, the Agricultural Yearbook published by the Department of Commerce in the year 1930, exemplified under the act of Congress, particularly that portion of which appears on page 1040 and 1042, which sets forth a schedule, sets forth the number of tractors in use for agricultural purposes only.

(Said plaintiff's exhibits 20, 21, 22, and 23 are attached hereto and made a part hereof.)

127 Irving K. Schnaitter, being recalled, further testified as follows:

Direct examination by Mr. Norris:

I accompanied Mr. Stiles, treasurer of the plaintiff company, on May 5, 1919, when he made the first payment of excise tax to the collector of internal revenue. I am familiar with the conversation which Mr. Stiles had with the cashier of the collector.

I have made search for the copy of the letter which accompanied that check and have not been able to find it. In a general way I am familiar with the contents of that letter. The letter stated that we were making payment of this excise tax under protest because we thought it was illegal. The letter was directed to the collector of internal revenue. If Mr. Weiss was in office at that time it was addressed to Mr. Weiss.

Mr. Norris. I offer in evidence plaintiff's exhibit 19. It is probably not a part of the record. It is demand for production.

(Plaintiff's exhibit 19 is attached hereto and made a part hereof).

Thereupon the plaintiff rested.

Mr. Kinder. I suppose although there are separate stipulations in five cases, the evidence in the case will be considered as consolidated in all cases.

The Court:

The cases are being tried together.

Mr. McMAHON. The Government offers in evidence defendant's exhibits A to X, inclusive. The defendant rests.

(Defendant's exhibits A to X are attached hereto and made a part hereof).

Thereupon the defendant rested.

Testimony closed.

128 The above and foregoing, together with the exhibits, was all of the evidence offered and received on the trial of the above-entitled cause.

Mr. McMAHON. The defendant at this time requests the court to make each of the findings of fact and conclusions of law set forth in its request for findings of fact and conclusions of law which it desires to file in each of these cases at this time.

The defendant now moves the court for judgment in favor of the defendant and against plaintiff, and to dismiss plaintiff's petition at plaintiff's costs on each of the grounds set forth in defendant's motion for judgment, which it desires to file at this time, in each of the cases consolidated for trial herein.

Mr. NORRIS. If the court please, in like manner I present requests for findings in each one of the five cases.

The COURT. I suppose your requests are also for statement of the court's conclusions and judgment for plaintiff.

Mr. NORRIS. Yes; I was going to ask that, sir. My requests for findings of fact I didn't know until late last night—our practice in Philadelphia is to file the requests for conclusions of law at the time of filing briefs. I find in my request for findings I have not included the request for the conclusions of law, and may I have leave to add it to this?

The COURT. Just add it to that; add it now. Anything further?

Mr. NORRIS. That is all.

The COURT. Plaintiff will have thirty days from this time to file its brief, and the Government may have fifteen days to file its reply brief. The case will be regarded as submitted.

129 Thereafter briefs were filed and the court after due consideration rendered his decision in favor of the plaintiff and against the defendant, as appears from the record herein.

Thereafter the court entered judgment upon said verdict, as appears of record herein, in favor of the plaintiff and against the defendant, to all of which the defendant duly excepted.

Now comes the defendant and presents to the court its bill of exceptions, in narrative form, taken on the trial of said cause, and the court, upon consideration thereof, with certain alterations, made on plaintiff's motion, to be a true, correct, and complete bill of exceptions, and the same is hereby allowed and signed and ordered to be filed as part of the record herein this 14 day of December 1931.

S. H. WEST, *Judge*.

In United States District Court

Order approving defendant's narrative form bill of exceptions

Entered December 14, 1931, in nos. 15761, 15762, 15763, 15764, 15765, by West, judge

This day the bill of exceptions in these cases was presented to the court, the same having been delivered to the clerk by the excepting party in accordance with rule 38 of the general rules of this court, and objections and suggestions thereto having been filed and considered by the court and the bill of exceptions as presented having been changed to conform with the ruling of the court on the objections and suggestions thereto, the same is allowed and signed and ordered to be filed in these cases.

130 In United States District Court

Petition

Filed May 31, 1929, in no. 15762

This petition is filed by the plaintiff, Willard Storage Battery Company, a corporation, against the defendant, C. F. Routzahn, collector of internal revenue of the United States for the 18th district of Ohio, to recover the sum of $249,275.32, with interest as hereinafter set forth, upon the cause of action of which the following is a statement:

1. Prior to December 1, 1922, and from that time to the present, the plaintiff was, and now is, a corporation organized and existing under the laws of the State of West Virginia, and during that time had and maintained, and now has and maintains, its manufacturing plant and principal place of business at 246 East 131st Street, in the city of Cleveland, in the State of Ohio, and at all times has been, and now is, a resident of the city of Cleveland, in the State of Ohio, in the United States of America.

2. On or about December 1, 1922, and continuously from that date to the present, the said C. F. Routzahn was the duly appointed collector of internal revenue of the United States for the eighteenth district of Ohio, in which is located the city of Cleveland, in the State of Ohio, and at all times herein mentioned was, and now is, a citizen and resident of the Northern District of Ohio, Eastern Division.

3. Prior to December 1, 1922, and from that date continuously to the present time, the plaintiff has been and now is, engaged in the manufacture and sale of electric storage batteries at its said plant at no. 246 East 131st Street in the city of Cleveland aforesaid.

4. In each calendar month, during the period beginning on December 1, 1922, and ending on November 30, 1923, the plaintiff made sales of electric storage batteries, all of which sales were made to

persons other than manufacturers of automobile trucks, automobile wagons, other automobiles or motorcycles, and on or before the last day of the calendar month then immediately succeeding each of the said months in which the said sales were made, in accordance with the requirements, and upon the demand of, the de-
131 fendant made a return in accordance with the provisions of title IX, section 900, of the United States Revenue Act of 1921, of the computation of manufacturer's excise taxes at the rate of five (5) per centum of the selling prices of the said electric storage batteries upon the sales thereof made by the plaintiff in each immediately preceding calendar month. The forms for the said returns were substantially alike, but were revised from time to time during the said period by the Commissioner of Internal Revenue; and, when filled in and made by the plaintiff, were delivered to the defendant by the plaintiff. The amount of the said manufacturer's excise tax was set forth in each of the said returns in a single sum, and represented the computation of five (5) per centum upon the selling price of the said electric storage batteries which had been sold by the plaintiff during the then preceding calendar month. A true copy of one of the said returns is hereunto attached, marked "Exhibit A" and made part hereof, and is submitted as a sample of, except as the same was revised as aforesaid, all such returns made by the plaintiff.

5. Heretofore, to wit, on the dates set forth in a statement thereof hereunto attached, marked "Exhibit B", and made part hereof, the plaintiff paid to the defendant, and the defendant collected from the plaintiff, the sums of money set opposite each of the several dates as set forth in "exhibit B", which said sums of money amounted in the aggregate to the sum of $249,275.32, and were paid by the plaintiff upon the demand of the defendant as manufacturer's excise taxes upon the selling price of electric storage batteries which were manufactured by the plaintiff, and sold by the plaintiff during the respective calendar months set opposite the said several dates respectively set forth in "exhibit B." All of said payments of taxes were made contemporaneously with, and in accordance with, the computation of the said excise taxes as set forth in the returns made by the plaintiff as hereinbefore described.

6. The electric storage batteries upon the selling prices of which the said taxes were paid by the plaintiff, as hereinbefore set forth, were commercial commodities, and were not specifically designed, nor primarily adaptable, only for use on, or in connection with, automobile trucks, automobile wagons, other automobiles or motor-
132 cycles, but were interchangeable for use in stationary and portable engines, and were, and are, extensively used in many industries, other than the automobile truck, automobile wagon, other automobile and motorcycle industries.

7. The electric storage battery of the kind sold by the plaintiff during the period between December 1, 1922, and November 30, 1923, and upon the selling prices of which the said taxes were paid by the

plaintiff upon the demand of the defendant, as hereinbefore set forth, was in general commercial use for many years before automobiles and automobile trucks and wagons came into existence, and were first used in the United States as a commercial commodity in or about the year 1859. In, or about, the year 1894, electric storage batteries were first used on, or in connection with, electric automotive vehicles only, and it was not until in, or about, the year 1911 that they were used on, or in connection with, automobile trucks, other automobiles or motor cycles (other than electric vehicles) and then only for the purpose of lighting. In, or about, the year 1915, electric storage batteries were first used on, or in connection with, automobiles, other than electric vehicles, for purposes other than lighting.

8. The electric storage battery of the kind sold by the plaintiff during the aforesaid period, and upon the selling prices of which the said manufacturer's excise taxes were paid by the plaintiff upon the demand of the defendant, as hereinbefore set forth, is used and for many years has been used, extensively in connection with motorboats, airplanes, tractors, locomotive engines, mine engines, submarines, artillery gun firing, lighting, current lighting and auxiliary power, signalling devices in railroad systems and in military service, search lights, telephone service, isolated lighting and power plants, street railways, fire alarm service, radio, and in a great many other industries and for a great many other purposes too numerous to mention.

9. The electric storage batteries which were sold by the plaintiff during the period beginning on December 1, 1922, and ending on November 30, 1923, as aforesaid, did not constitute parts or accessories for any of the articles enumerated in subdivision (1) or (2) of title IX, section 900, of the United States Revenue Act
133 of 1921, and neither said batteries or the sale thereof by the plaintiff were subject to the manufacturer's excise tax provided therein, and the defendant erroneously and illegally collected from the plaintiff as such manufacturer's excise taxes upon said sales the sum of $249,275.32 as set forth in "Exhibit B" hereunto attached.

10. There are attached hereto, marked "Exhibit C", and made part hereof, true and correct copies of the original receipts executed by the defendant for the taxes paid in each calendar month by the plaintiff to, and upon the demand of, the defendant, as hereinbefore set forth, and true and correct copies of the checks of the plaintiff which were paid to and upon the demand of the defendant, and represented the payment of the taxes as set forth in the said receipts and upon each of which said checks appears the number imposed thereon by the defendant.

11. All of the taxes hereinbefore set forth were paid by the plaintiff upon the demand of the defendant, and were paid by the plaintiff to the defendant under protest, as not being due or payable upon the sales of the electric storage batteries manufactured and sold by the plaintiff, as aforesaid.

12. Heretofore, to wit, October 5, 1926, the plaintiff duly filed with the Commissioner of Internal Revenue of the United States a claim for the refund of the said manufacturer's excise taxes erroneously and illegally collected by the defendant from the plaintiff during the period beginning January 1, 1923, and ending on December 31, 1923, a true copy of which said claim is hereunto attached, marked "Exhibit D", and made part hereof; and thereafter, to wit, on or about November 3, 1926, the plaintiff filed with the Commissioner of Internal Revenue an amended claim for the refund of the said taxes erroneously and illegally collected by the defendant from the plaintiff during the period aforesaid, a true copy of which amended claim of refund is hereunto attached, marked "Exhibit E", and made part hereof. The said Commissioner of Internal Revenue, on or about June 21, 1927, rejected the said claim by letter bearing said date, a true copy of which said letter is hereunto attached, marked "Exhibit F", and made part hereof.

134 13. There is justly due by the defendant to the plaintiff, and the plaintiff prays that judgment may be entered in favor of the plaintiff and against the defendant in the sum of $249,275.32, with interest upon each of the payments of the said manufacturer's excise taxes as set forth in "Exhibit B" hereunto attached from the respective dates of such payments and for its costs herein expended.

WILLARD STORAGE BATTERY COMPANY.
CHARLES C. NORRIS, JR.,
Philadelphia, Pa.

By F. L. FRIEND, J.,
Its Attorneys.

[*Duly sworn to by C. H. Gibney; jurat omitted in printing.*]

PRAECIPE

To the Clerk of the Said Court:

Issue summons for the defendant, returnable according to law, and endorse the same: Action for money judgment only. Amount claimed $249,275.32 with interest at the rate of 6% per annum as provided by law on the following sums from the following dates respectively: On $22,486.39 from January 30, 1923; on $15,076.44 from February 27, 1923; on $22,133.63 from March 30, 1923; on $31,792.23 from April 27, 1923; on $25,920.09 from May 29, 1923; on $14,657.74 from June 29, 1923; on $15,790.62 from July 30, 1923; on $12,705.08 from August 30, 1923; on $22,826.28 from Sep-
135 tember 28, 1923; on $17,912.98 from October 30, 1923; on $26,236.87 from November 28, 1923; on $21,736.97 from December 28, 1923, with costs.

CHARLES C. NORRIS, JR.,
Philadelphia, Pa.
F. C. FRIEND,
Counsel for Plaintiff.

Note re exhibit "A"

Printer's Note:

This exhibit being identical with exhibit A, attached to petition in case no. 15701, it has been omitted to comply with the rule against duplication. (See page 8 of this record.)

Exhibit "B" to petition

Month of sales	Date of payment	Amount of tax paid
1992, December	1993, January 30	$92,486.30
1993, January	" February 27	16,076.44
" February	" March 30	22,133.83
" March	" April 27	31,702.23
" April	" May 29	25,029.06
" May	" June 29	14,057.74
" June	" July 30	15,399.69
" July	" August 30	12,208.08
" August	" September 28	22,896.28
" September	" October 30	17,912.88
" October	" November 29	20,230.87
" November	" December 28	21,730.97
		240,978.32

143 *Exhibit "D" to petition*

(Execute separate form for each tax period)

Treasury Department
Internal Revenue Service
Form 843 Jan. 1922
Comptroller General U.S.
January 18, 1922

Collector's Notation
District
Account number
Date received
Stamp here
Collector of
Internal Revenue

Claim for

Abatement of tax assessed
Credit against outstanding assessments
Refund of taxes illegally collected
Refund of amounts paid for stamps

Used in error or excess

Important

File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

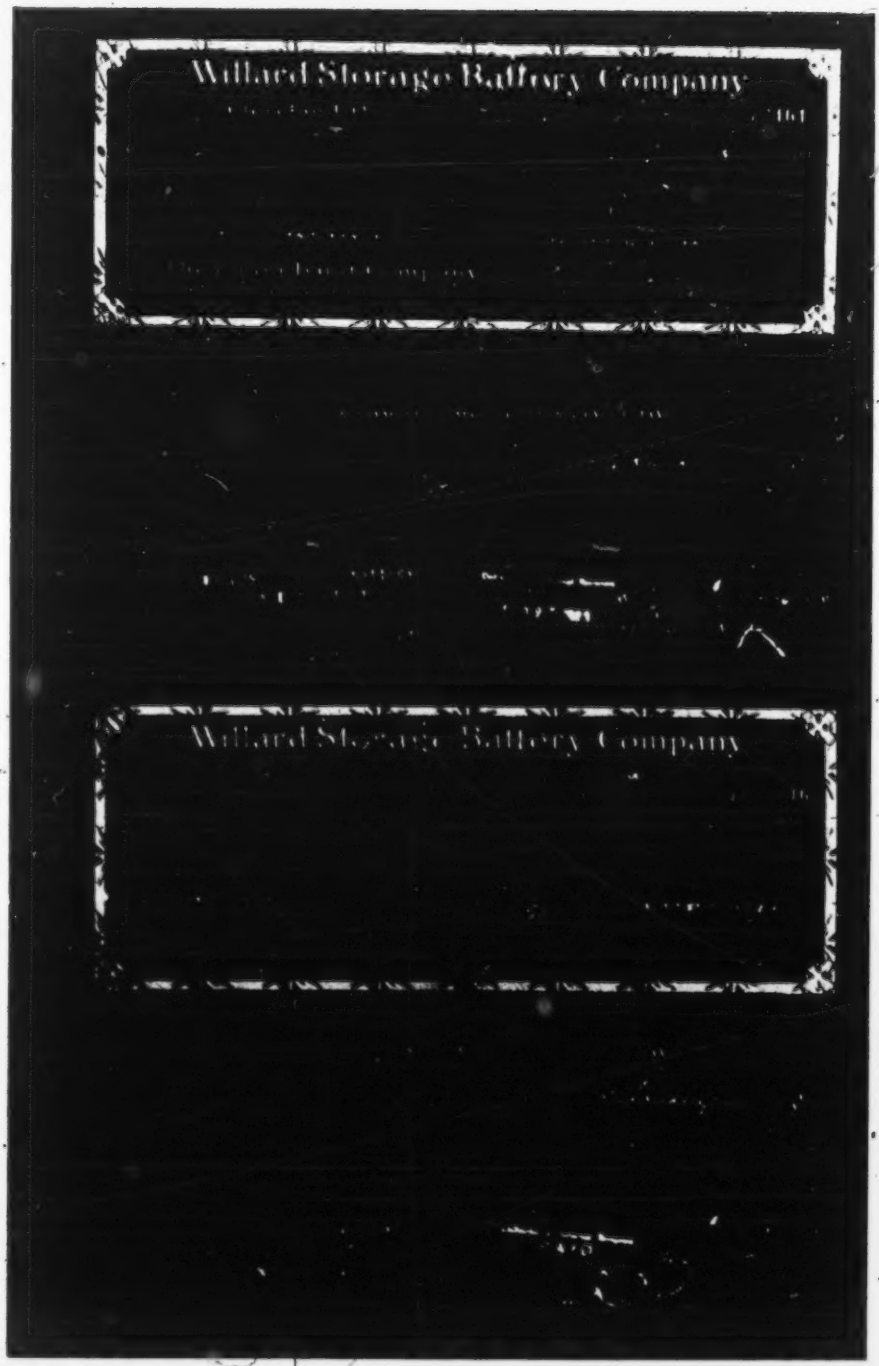
Notice To Collector

Collector must indicate in block above the kind of claim, except in Income Tax cases.

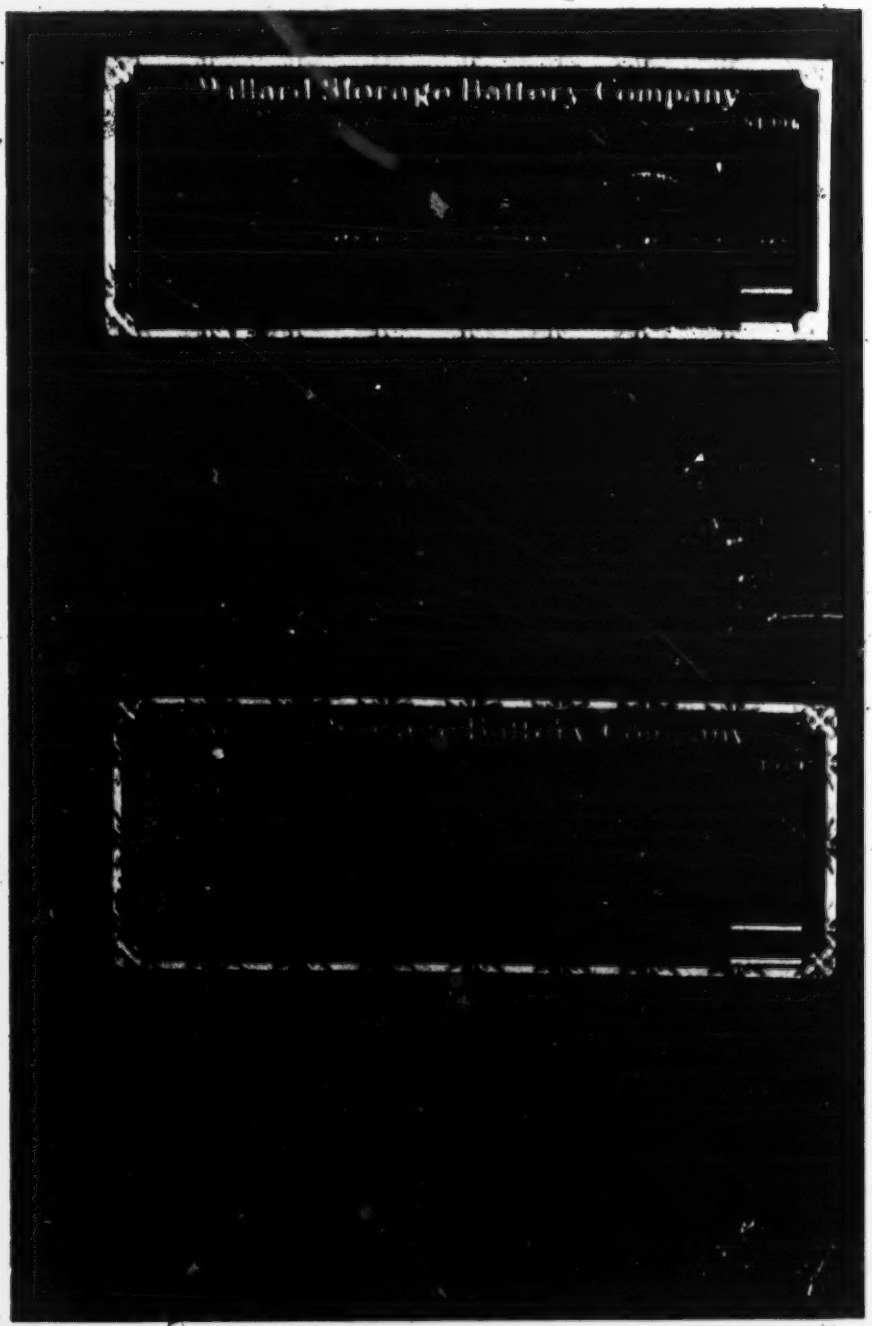
State of Ohio,
COUNTY OF CUYAHOGA, ss:

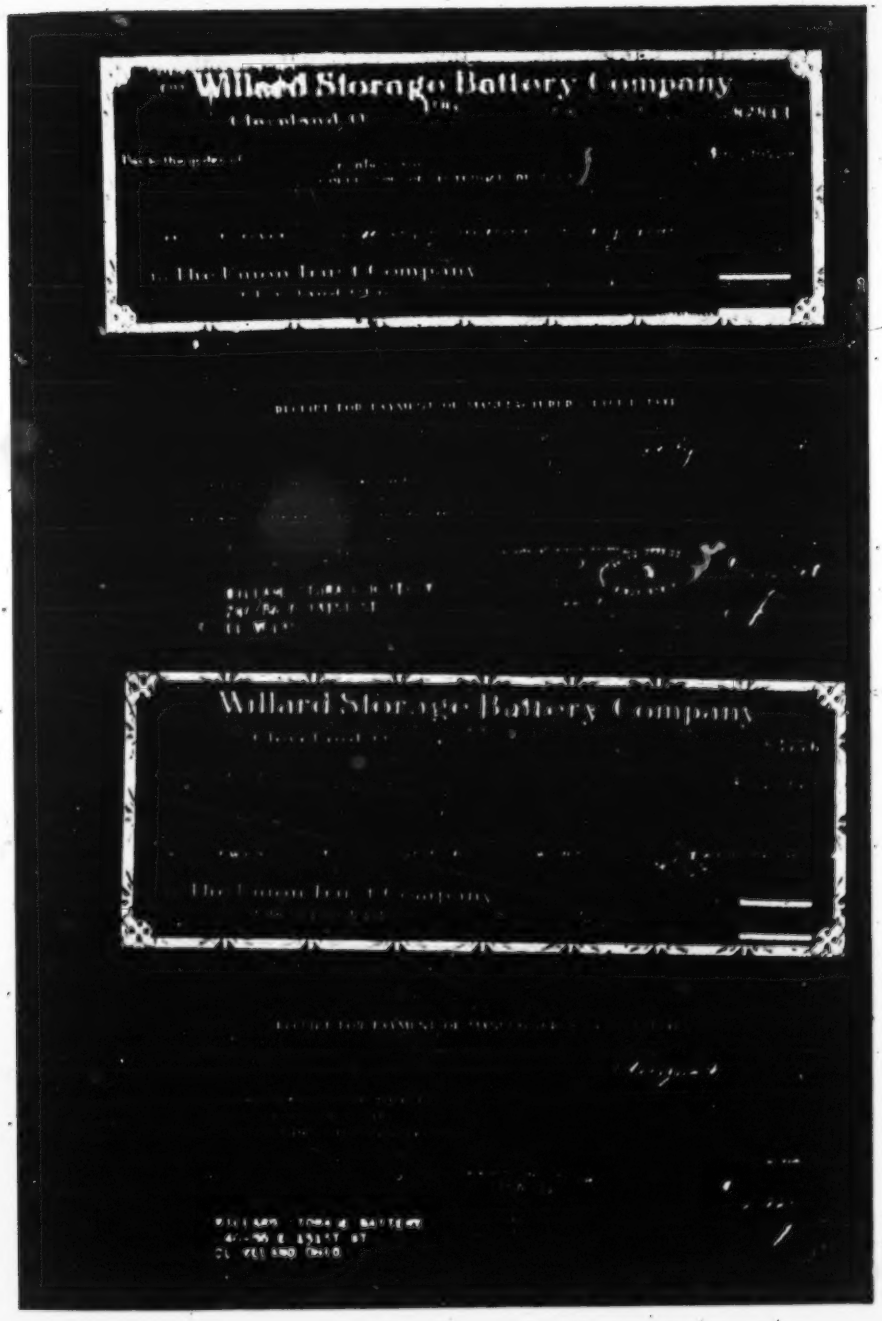
Date received by
Administrative Unit
10/5/26
Stamp here

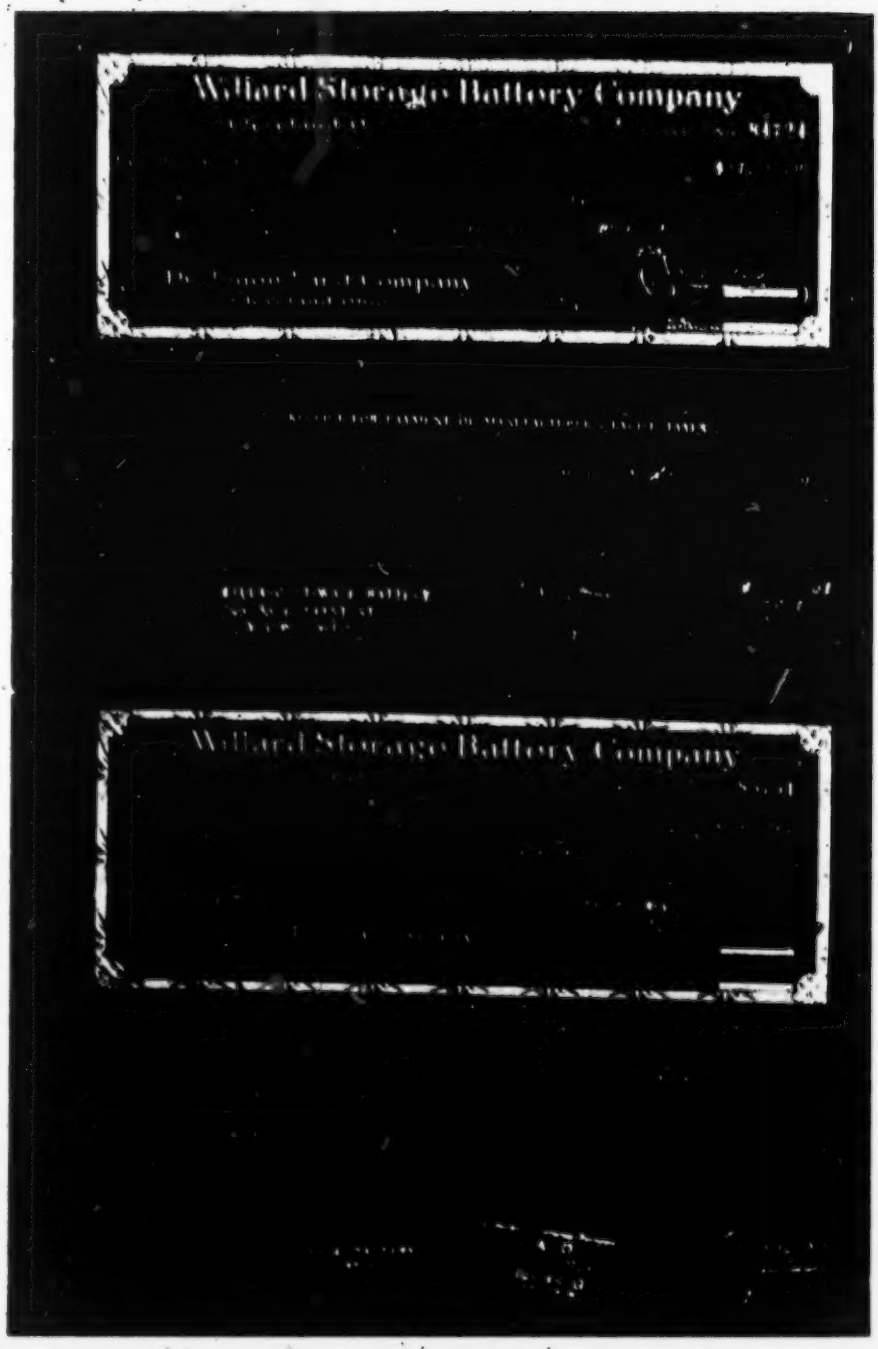
90-1

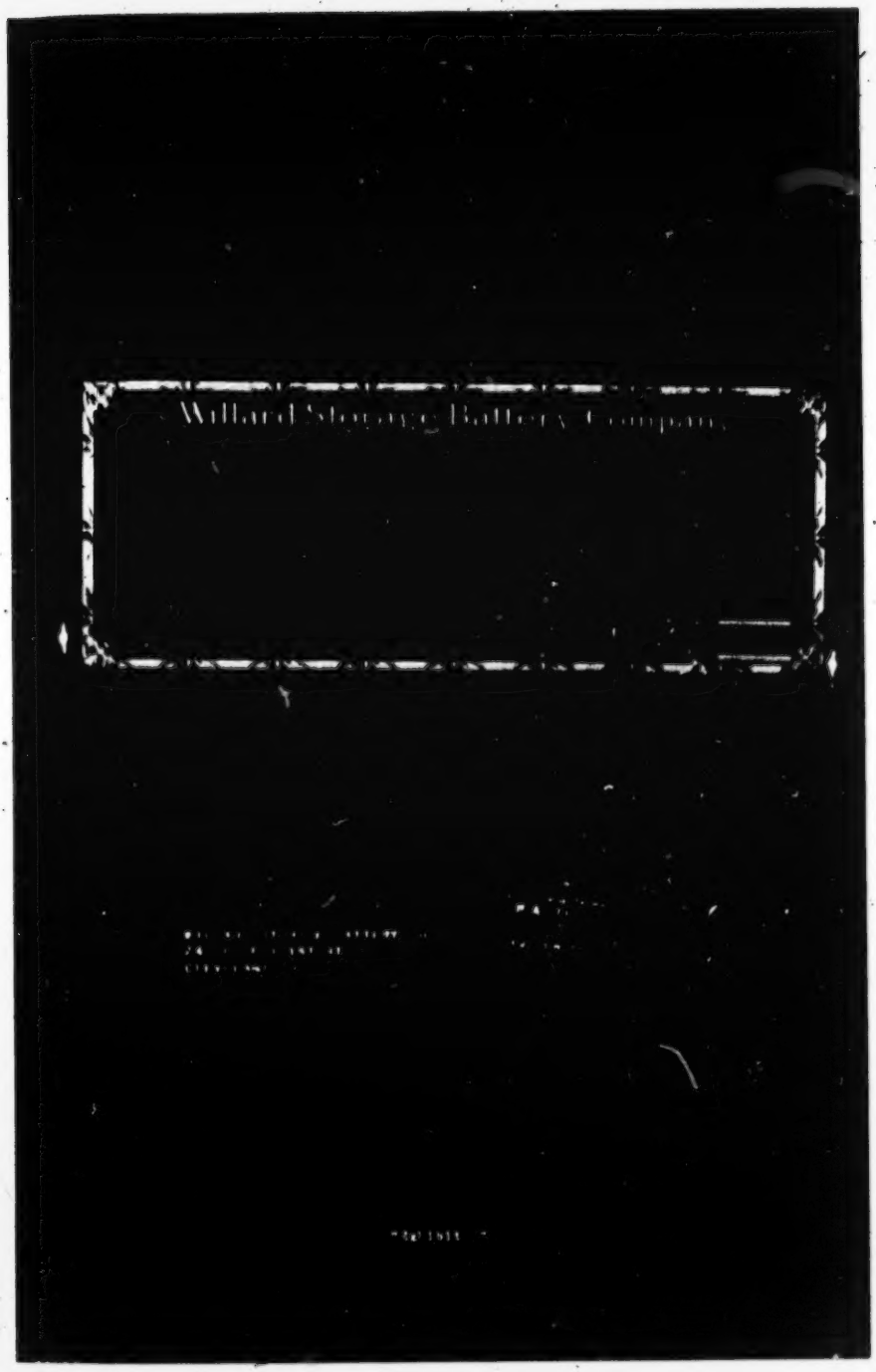

Willard Storage Battery Company
Willard Storage Battery Company

Willard Storage Battery Company
Willard Storage Battery Company


Willard Storage Battery Company


Willard Storage Battery Company
Willard Storage Battery Company


Willard Storage Battery Company
Willard Storage Battery Company


Willard Storage Battery Company

Willard Storage Battery Company

Type (Name of taxpayer or purchaser of stamps)
Or 246 East 131st Street, Cleveland, Ohio
Print (Residence—give street and number as well as city or town and State)

Same

(Business address)

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

	Period Year
	From: January 1st, 1924
	To: December 31st, 1924
1. Business in which engaged manufacture of electric storage batteries.	
144 2. Character of assessment or tax manufacturers' excise tax on batteries. (State for or upon what the tax was assessed or the stamps affixed.)	
3. Amount of assessment	$243,047.28
4. Reduction of tax liability requested (income and profits tax)	
5. Amount to be abated	$
6. Amount to be refunded (or such greater amount as is legally refundable)	$243,047.28
7. Date of payment (see collector's receipts or indorsements of canceled checks)	
(If statement covers income-tax liability items 8–11, inclusive, must be answered.)	
8. District in which return (if any) was filed Cleveland, Ohio.	
9. District in which unpaid assessment appears	
10. Amount of overpayment claimed as credit	$
11. Unpaid assessment against which credit is asked; period from ---------- to ----------	$

Deponent verily believes that this application should be allowed for the following reasons:

Our returns have been filed monthly and the tax paid as required by regulations. As there is only one question involved we are filing this claim for refund by calendar years to cover twelve monthly payments in order to cut the records and correspondence to a minimum.

Our request for refund is based upon the fact that storage batteries were in use before the automobile came into existence, that they are used in connection with all kinds of internal-combustion engines, marine, stationary, and portable. While they are used very extensively in automobiles, the same storage batteries are used in motor boats, aeroplanes, farm tractors, road graders, railway locomotive engines, thrashing engines, concrete mixers, water pumps, hoisting machines, electric door bells, radios, laboratory work, and in various other situations when small electric power is required.

145 In view of the above facts, we claim that the collection of the manufacturers' excise tax imposed by Regulations No. 47, under the Revenue Acts of 1918, 1921, and 1924, was a tax illegally collected and as such should be refunded.

(Attached additional sheets if necessary.)

(Signed) F. J. STILES.

Sworn to and subscribed before me this 22nd day of September 1926.

E. L. PETERS,

(Title) *Notary Public.*

(This affidavit may be sworn to before a deputy collector of internal revenue or revenue agent without charge.)

Exhibit "E" to petition

Amended claim

(Execute separate form for each tax period).

Treasury Department,	Collector's notation district.
Internal Revenue Service,	Account number.
Form 843—Jan. 1922.	Date received.
Comptroller General U.S.,	Stamp here.
January 18, 1922.	Collector of internal revenue.

Claim for

Abatement of tax assessed.
Credit against outstanding assessments.
Refund of taxes illegally collected.
Refund of amounts paid for stamps.

Used in error or excess

Important	Notice to collector
File with collector of internal revenue where assessment was made. Not acceptable unless completely filled in.	Collector must indicate in block above the kind of claim, except in income-tax cases.

146 STATE OF OHIO,
County of Cuyahoga, ss:

Date received by Administrative Unit, 10 5 26. Stamp here.

Willard Storage Battery Company

Type (name of taxpayer or purchaser of stamps).
Or 246 East 131st Street, Cleveland, Ohio.
Print (residence—give street and number as well as city or town and State).

Same

(Business address)

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

	Period	Year
	From: January 1st,	1926
	To: February 26th,	1926
1. Business in which engaged: Manufacture of electric storage batteries.		
2. Character of assessment or tax: Manufacturer's excise tax on batteries; (State for or upon what the tax was assessed or the stamps affixed.)		
3. Amount of assessment		$249,275.32
4. Reduction of tax liability requested (income and profits tax)		$
5. Amount to be abated		$
6. Amount to be refunded (or such greater amount as is legally refundable)		$249,275.32
7. Dates of payment (see collector's receipts or indorsements of cancelled checks)		
(If statement covers income-tax liability, items 8-11, inclusive, must be answered.)		
8. District in which return (if any) was filed		
9. District in which unpaid assessment appears		
10. Amount of overpayment claimed as credit		$
11. Unpaid assessment against which credit is asked: period from ____ to ____		$

Deponent verily believes that this application should be allowed for the following reasons:

147 This is an amended claim based on the period in which tax was actually paid. Original claim filed October 5th, 1926, was based on period when tax was due.

(Attach additional sheets if necessary.)

(Signed) F. J. STILES.

Sworn to and subscribed before me this ____ day of ____, 19__.

_____

_____

(Title)

(This affidavit may be sworn to before a deputy collector of internal revenue or revenue agent without charge.)

Exhibit "F" to petition

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, June 21, 1927.

Address reply to Commissioner of Internal Revenue, and refer to MT:M:WED C1-S-701.

WILLARD STORAGE BATTERY COMPANY,
246 East 131st Street, Cleveland, Ohio.

GENTLEMEN: Reference is made to your claim for refund of $249,275.32 paid as manufacturer's excise tax on automobile parts and accessories.

You are requested to advise within 30 days whether you intended to comply with Treasury Decision 4045 in the prosecution of your claim.

This office is in receipt of your letter dated June 10, 1927, from which it appears that you do not intend to prosecute the matter further along the lines suggested. Your claim is accordingly hereby rejected for lack of evidence.

Respectfully,

EM

C. R. NASH,
Acting Commissioner.

148 In United States District Court

Defendant's motion to dismiss

Filed July 8, 1929, in no. 15762

Now comes Wilfred J. Mahon, United States attorney for the northern district of Ohio, on behalf of the defendant herein, and by leave of court first obtained, moves to dismiss the above entitled cause upon the grounds and reasons therefor as follows:

1. Because the provisions of section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of refund of manufacturer's excise taxes collected under the provisions of section 900 (3) of the Revenue Act of 1921 and section 600 (3) of the Revenue Act of 1924 in an action instituted subsequent to April 30, 1928.

2. Because the provisions of section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of instituting and maintaining an action, subsequent to May 29, 1928, effective date of the act, for the recovery of manufacturer's excise tax paid under the provisions of section 900 (3) of the Revenue Act of 1921 and section 600 (3) of the Revenue Act of 1924.

3. Because this court is without jurisdiction to review the discretionary power vested in the Commissioner of Internal Revenue by the provisions of section 424 of the Revenue Act of 1928.

4. Because the provisions of section 424 of the Revenue Act of 1928 provide an exclusive remedy.

W. J. MAHON,
United States Attorney.

The plaintiff will take notice that the defendant has filed a motion to dismiss in the above-entitled case; that such motion will be on for hearing at such time as the court shall designate.

W. J. MAHON.

Received service of the above motion and notice this 8 day of June 1929.

CHARLES C. NORRIS, JR., and
F. C. FRIEND,
Attys. for Plff.

149 In United States District Court

Answer

Filed April 12, 1930, in no. 15762

Now comes Wilfred J. Mahon, United States attorney for the northern district of Ohio, on behalf of the defendant herein, by leave of court first obtained, and for answer to plaintiff's petition, admits the corporate capacity of the plaintiff herein; admits that defendant is the duly appointed, qualified, and acting collector of internal revenue of the United States for the eighteenth district of Ohio, and that the city of Cleveland is located in said district.

Defendant admits that prior to December 1, 1922, and from that date continuously to the present time, plaintiff has been and now is engaged in the manufacture and sale of electric storage batteries at its said plant at 246 East 131st Street, Cleveland, Ohio.

Defendant admits all the allegations contained in paragraph 4 of plaintiff's petition, admitting the allegation that all of said sales upon which tax was paid were made to persons other than manufacturers of automobile trucks, automobile wagons, motorcycles, and other automobiles.

Defendant admits the allegations contained in paragraph 5 of plaintiff's petition.

Defendant denies the allegation contained in paragraph 6 of plaintiff's petition that the electric storage batteries, upon the selling prices of which the said taxes were paid by the plaintiff, were commercial commodities; defendant denies each and every other allegation contained therein.

Defendant denies all of the allegations contained in paragraphs 7, 8, and 9 of plaintiff's petition.

Defendant admits the allegations contained in paragraph 10 of plaintiff's petition.

Defendant denies the allegations contained in paragraph 11 of plaintiff's petition.

Defendant admits that on October 5, 1926, plaintiff filed with the Commissioner of Internal Revenue a claim for refund of taxes paid on electric storage batteries for the taxable periods beginning
150 January 1, 1923, and ending on December 31, 1923, in the sum of $243,047.28, and further says that said claim for refund was duly rejected by the Commissioner of Internal Revenue on June 25, 1929.

Defendant admits that plaintiff filed an amended claim for refund with the Commissioner of Internal Revenue for said taxable period, but denies that said amended claim for refund was filed on November 3, 1926, but was filed on October 29, 1926, for the sum of $249,275.32. Defendant further says that said amended claim for refund was duly rejected by the Commissioner of Internal Revenue on June 21, 1927.

Defendant denies that said manufacturers excise taxes were erroneously and illegally collected.

Defendant denies that there is due plaintiff the sum of $249,275.32 with interest, or any sum whatsoever, by reason of payment of manufacturers excise taxes by plaintiff in the premises.

Defendant further says that under the provisions of section 424 of the Revenue Act of 1928 plaintiff is deprived of the right of refund of manufacturers excise taxes collected under the provisions of section 900 (3) of the Revenue Act of 1921 and section 600 (3) of the Revenue Act of 1924 in any action instituted subsequent to April 30, 1928, or in any action instituted subsequent to May 29, 1928; that the provisions of section 424 of the Revenue Act of 1928 vest a discretionary power in the Commissioner of Internal Revenue which this court is without jurisdiction to review; that the provisions of section 424 of the Revenue Act of 1928 provide an exclusive remedy within the Treasury Department of the United States.

Wherefore defendant prays that plaintiff's petition be dismissed and that he be allowed to go hence with his costs.

WILFRED J. MAHON,
United States Attorney.

[*Duly sworn to by Wilfred J. Mahon; jurat omitted in printing.*]

151 Copy sent counsel for pltff. 4-11-30.

W. J. MAHON.

Routzahn v. Willard Storage.

In United States District Court

Order consolidating case no. 15762 law with nos. 15761-3-4-5 for trial only

Entered May 14, 1931, in no. 19762, by West, Judge

It is ordered that this case be consolidated with cases 15761,.15763, 15764 and 15765 law for trial only.

152 In United States District Court

Stipulation of facts

Filed May 14, 1931, in no. 15762

It is hereby stipulated by and between the parties hereto, by their respective attorneys, that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice

to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true.

1. The Willard Storage Battery Company during the times hereinafter mentioned was and now is a corporation organized, existing and operating under and by virtue of the laws of the State of West Virginia with its principal place of business located at Cleveland, Ohio.

2. The defendant, C. F. Routzahn, during the times hereinafter mentioned was and now is the duly appointed, qualified and acting collector of internal revenue for the eighteenth district of Ohio.

3. During the times hereinafter mentioned plaintiff was engaged in the business of manufacturing and selling electric storage batteries.

4. Plaintiff and all the officers thereof have at all times borne true allegiance to the United States of America and have not, nor have any of them in any way voluntarily aided, abetted, or given encouragement to rebellion against the United States and plaintiff is a citizen of the United States, the sole owner of the claim hereinafter stated, no action has been had thereon before Congress or any Governmental Department, except as hereinafter stated, and no part of which has ever been sold or assigned.

5. Plaintiff filed its manufacturer's excise tax returns monthly for the taxable periods December 1922 to November 1923, inclusive, showing the amount of tax due thereon which was duly assessed on such returns by the Commissioner of Internal Revenue, paid by plaintiff, for the months, in the amounts, and on the dates hereinafter set forth as follows:

153

Period	Year	Month	Year	Page	Line	Amount	Date paid
Dec	1922	Jan	1923	50	1	$22,486.39	1/30/23
Jan	1923	Feb	"	71	0	15,076.44	2/29/23
Feb	"	Mar	"	60	2	22,133.63	3/30/23
Mar	"	Apr	"	52	8	31,792.23	4/27/23
Apr	"	May	"	60	5	25,920.09	5/31/23
May	"	June	"	58	8	14,657.74	6/30/23
June	"	July	"	53	0	15,790.62	7/31/23
July	"	Aug	"	49	5	12,705.08	8/30/23
Aug	"	Sept	"	44	5	22,826.28	9/29/23
Sept	"	Oct	"	59	3	17,912.98	10/31/23
Oct	"	Nov	"	52	5	26,236.87	11/30/23
Nov	"	Dec	"	52	7	21,730.97	12/29/23

6. On October 5, 1926, plaintiff filed its claim for refund no. 21168 of manufacturer's excise tax so paid on the manufacture and sale of electric storage batteries for the taxable periods January 1923 to December 1923, inclusive, in the amount of $243,047.28, which was duly rejected by the Commissioner of Internal Revenue on June 25, 1929.

7. On October 29, 1926, plaintiff filed its amended claim for refund no. 701 of manufacturer's excise tax so paid on the manufacture and

sale of electric storage batteries for the taxable periods January 1923 to November 1923, inclusive, in the amount of $249,275.32, which was duly rejected by the Commissioner of Internal Revenue on June 21, 1927.

8: Duly certified photostat copies of returns, claims for refund, claims for credit, claims for abatement, waivers, assessments, reports, letters, and other departmental records pertinent to the issues in this case shall be admitted and received in evidence the same as if the originals thereof were properly identified and admitted, subject only to the right of either party to object because of their irrelevancy or immateriality.

WILLARD STORAGE BATTERY COMPANY,
By CHARLES C. NORRIS, Jr.,
Attorneys for Plaintiff.
C. F. ROUTZAHN, *Collector,*
By W. J. MAHON,
U.S. Attorney for Defendant.
By JOHN B. OSMUN,
Asst. U.S. Atty.
E. F. McMAHON, *Special Atty.*

154 In United States District Court

Jury waived; trial in progress; portion of plaintiff's testimony adduced; adjournment to May 15, 1931

Entered May 14, 1931, in no. 15762, by West, Judge

This day came the parties by their attorneys and a jury having been waived, this cause came on to be heard by the court on the pleadings and the evidence, and the court having heard a part of the testimony adduced on behalf of the plaintiff, and the hour for adjournment having arrived, the further trial of this cause was postponed until tomorrow morning at 9:30 o'clock.

In United States District Court

Trial in progress; plaintiff's testimony concluded; defendant's testimony concluded; cause taken under advisement by the court

Entered May 15, 1931, in no. 15762, by West, Judge

This day again came the parties by their attorneys and a jury having been waived, this cause came on to be heard by the court on the pleadings and the evidence, and the court having heard all of the testimony adduced on behalf of the parties, took the cause under advisement.

155 In United States District Court

Waiver of jury

Filed March 9, 1931, in no. 15762

We, the attorneys for the respective parties, hereby waive the trial to the jury of this cause, and agree to submit the same to the court without the intervention of a jury.

TOLLES, HOGSETT & GINN,
Attorney for Plaintiff.
WILFRED J. MAHON,
Attorney for Defendant.

In United States District Court

Order of judgment

Entered October 27, 1931, in no. 15762, by West, Judge

This cause coming on to be heard upon the pleadings, the evidence and the argument of counsel, the court having made special findings of fact and conclusions of law in this and four other cases consolidated herewith, which findings of fact and conclusions of law are hereby referred to, on due consideration of the premises it is

Ordered, decreed, and adjudged that the plaintiff recover from the defendant the sum of $249,275.32, together with interest on the following amounts of taxes paid from the following respective dates of payment at the rate of 6% per annum to a date set by the Commissioner of Internal Revenue of the United States, such date to be not more than thirty days earlier than that of the refund check, to wit:

156 $22,486.39 from January 30, 1923; $15,076.44 from February 28, 1923; $22,133.63 from March 30, 1923; $31,792.23 from April 27, 1923; $25,920.09 from May 31, 1923; $14,657.74 from June 30, 1923; $15,790.62 from July 31, 1923; $12,705.08 from August 30, 1923; $22,826.23 from September 29, 1933; $17,912.98 from October 31, 1923; $26,236.87 from November 30, 1923; $21,736.97 from December 29, 1923.

It is further ordered that plaintiff recover its costs herein expended, taxed at $----------.

Defendant is allowed his exceptions to this judgment and to said findings of fact and conclusions of law.

S. H. WEST, *Judge.*

Approved:
W. J. MAHON, *U.S. Atty.*

In United States District Court

Certificate of probable cause

Filed Oct. 27, 1931, in no. 15762

The court having rendered judgment herein in favor of the plaintiff in the amount of $249,275.32, together with interest and costs, said judgment being against C. F. Routzahn, a duly appointed, qualified, and acting collector of internal revenue, upon consideration of the evidence, the court finds and hereby certifies that the
157 said judgment is for the recovery of money collected by the said defendant as collector of internal revenue and by him paid into the Treasury of the United States in the performance of his official duties with reference to the collection of income, excise, and profits taxes, and that there was probable cause for the act so done by the said defendant collector, by reason whereof the judgment herein was rendered.

S. H. WEST,
United States District Judge.

In United States District Court

Petition

Filed May 21, 1929, in no. 15763

This petition is filed by the plaintiff, Willard Storage Battery Company, a corporation, against the defendant, C. F. Routzahn, collector of internal revenue of the United States for the 18th district of Ohio, to recover the sum of $189,853.88, with interest as hereinafter set forth, upon the cause of action of which the following is a statement:

1. Prior to December 1, 1923, and from that time to the present, the plaintiff was, and now is, a corporation organized and existing under the laws of the State of West Virginia, and during that time had and maintained, and now has and maintains, its manufacturing plant and principal place of business at 246 East 131st Street, in the city of Cleveland, in the State of Ohio, and at all times has been, and now is, a resident of the city of Cleveland, in the Stte of Ohio, in the United States of America.

158 2. On or about December 1, 1923, and continuously from that date to the present, the said C. F. Routzahn was the duly appointed collector of internal revenue of the United States for the eighteenth district of Ohio, in which is located the city of Cleveland, in the State of Ohio, and at all times herein mentioned was, and now is, a citizen and resident of the northern district of Ohio, eastern division.

3. Prior to December 1, 1923, and from that date continuously to the present time, the plaintiff has been, and now is, engaged in the manufacture and sale of electric storage batteries at its said plant at no. 246 East 131st Street in the city of Cleveland aforesaid.

4. In each calendar month, during the period beginning on December 1, 1923, and ending on November 30, 1924, the plaintiff made sales of electric storage batteries, all of which sales were made to persons other than manufacturers of automobile trucks, automobile wagons, other automobiles, or motorcycles, and on or before the last day of the calendar month then immediately succeeding each of the said months in which the said sales were made, in accordance with the requirements, and upon the demand of, the defendant made a return in accordance with the provisions of title IX, section 900, of the United States Revenue Act of 1921 after computation of manufacturer's excise taxes at the rate of five (5) per centum and under title VI, section 600, of the United States Revenue Act of 1924 of the computation of manufacturer's excise taxes at the rate of two and one half (2½) per centum of the selling prices of the said electric storage batteries upon the sales thereof made by the plaintiff in each immediately preceding calendar month. The forms for the said returns were substantially alike, but were revised from time to time during the said period by the Commissioner of Internal Revenue; and, when filled in and made by the plaintiff, were delivered to the defendant by the plaintiff. The amount of the said manufacturer's excise tax was set forth in each of the said returns in a single sum, and represented the computation of five (5) or two and one half (2½) per centum upon the selling price of the said electric storage batteries which had been sold by the plaintiff during the then preceding calendar month. A true copy of one of the
159 said returns is hereunto attached, marked "Exhibit A", and made part hereof, and is submitted as a sample of, except as the same was revised as aforesaid, all such returns made by the plaintiff.

5. Heretofore, to wit, on the dates set forth in a statement thereof hereunto attached, marked "exhibit B", and made part hereof, the plaintiff paid to the defendant, and the defendant collected from the plaintiff, the sums of money set opposite each of the several dates as set forth in "exhibit B", which said sums of money amounted in the aggregate to the sum of $189,853.88, and were paid by the plaintiff upon the demand of the defendant as manufacturer's excise taxes upon the selling price of electric storage batteries which were manufactured by the plaintiff, and sold by the plaintiff during the respective calendar months set opposite the said several dates respectively set forth in "exhibit B." All of said payments of taxes were made contemporaneously with, and in accordance with, the computation of the said excise taxes as set forth in the returns made by the plaintiff as hereinbefore described.

6. The electric storage batteries upon the selling prices of which the said taxes were paid by the plaintiff, as hereinbefore set forth, were commercial commodities, and were not specifically designed, nor primarily adaptable, only for use on, or in connection with, automobile trucks, automobile wagons, other automobiles or motorcycles, but were interchangeable for use in stationary and portable engines, and were, and are, extensively used in many industries other than the automobile truck, automobile wagon, other automobile and motorcycle industries.

7. The electric storage battery of the kind sold by the plaintiff during the period between December 1, 1923, and November 30, 1924, and upon the selling prices of which the said taxes were paid by the plaintiff upon the demand of the defendant, as hereinbefore set forth, was in general commercial use for many years before automobiles and automobile trucks and wagons came into existence, and were first used in the United States as a commercial commodity in or about the year 1859. In, or about, the year 1894, electric storage batteries were first used on, or in connection with, electric automotive vehicles only, and it was not until in, or about, the
160 year 1911 that they were used on, or in connection with, automobile trucks, other automobiles or motorcycles (other than electric vehicles) and then only for the purpose of lighting. In, or about, the year 1915 electric storage batteries were first used on, or in connection with, automobiles other than electric vehicles, for purposes other than lighting.

8. The electric storage battery of the kind sold by the plaintiff during the aforesaid period, and upon the selling prices of which the said manufacturer's excise taxes were paid by the plaintiff upon the demand of the defendant, as hereinbefore set forth, is used, and for many years has been used, extensively in connection with motor boats, airplanes, tractors, locomotive engines, mine engines, submarines, artillery gun firing, lighting, turret lighting and auxiliary power, signalling devices in railroad systems and in military service, search lights, telephone service, isolated lighting and power plants, street railways, fire alarm service, radio, and in a great many other industries and for a great many other purposes too numerous to mention.

9. The electric storage batteries which were sold by the plaintiff during the period beginning on December 1, 1923, and ending on November 30, 1924, as aforesaid, did not constitute parts or accessories for any of the articles enumerated in subdivision (1) or (2) of title IX, section 900 of the United States Revenue Act of 1921 or in subdivision (1) or (2) of title VI, section 600 of the United States Revenue Act of 1924, and neither said batteries or the sale thereof by the plaintiff were subject to the manufacturer's excise tax provided therein, and the defendant erroneously and illegally collected from the plaintiff as such manufacturer's excise taxes upon said

sales the sum of $189,853.88 as set forth in "exhibit B" hereunto attached.

10. There are attached hereto, marked "Exhibit C", and made part hereof, true and correct copies of the original receipts executed by the defendant for the taxes paid in each calendar month by the plaintiff to, and upon the demand of, the defendant, as hereinbefore set forth, and true and correct copies of the checks of the plaintiff which were paid to and upon the demand of the defendant,
161 and represented the payment of the taxes as set forth in the said receipts and upon each of which said checks appears the number imposed thereon by the defendant.

11. All of the taxes hereinbefore set forth were paid by the plaintiff upon the demand of the defendant, and were paid by the plaintiff to the defendant under protest, as not being due or payable upon the sales of the electric storage batteries manufactured and sold by the plaintiff, as aforesaid.

12. Heretofore, to wit, October 5, 1926, the plaintiff duly filed with the Commissioner of Internal Revenue of the United States a claim for the refund of the said manufacturer's excise taxes erroneously and illegally collected by the defendant from the plaintiff during the period beginning January 1, 1924, and ending on December 31, 1924, a true copy of which said claim is hereunto attached, marked "Exhibit D" and made part hereof; and thereafter, to wit, on or about November 3, 1926, the plaintiff filed with the Commissioner of Internal Revenue an amended claim for the refund of the said taxes erroneously and illegally collected by the defendant from the plaintiff during the period aforesaid, a true copy of which amended claim of refund is hereunto attached, marked "Exhibit E" and made part hereof. The said Commissioner of Internal Revenue, on or about June 21, 1927, rejected the said claim by letter bearing said date, a true copy of which said letter is hereunto attached, marked "Exhibit F", and made part hereof.

13. There is justly due by the defendant to the plaintiff, and the plaintiff prays that judgment may be entered in favor of the plaintiff and against the defendant, in the sum of $189,853.88, with interest upon each of the payments of the said manufacturer's excise taxes as set forth in "exhibit B", hereunto attached from the respective dates of such payments and for its costs herein expended.

WILLARD STORAGE BATTERY COMPANY,
CHARLES C. NORRIS, JR., *Philadelphia, Pa.*
By F. C. FRIEND, *Its Attorneys.*

162 [Duly sworn to by C. H. Gibney, jurat omitted in printing.]

PRAECIPE

To the Clerk of the Said Court:

Issue summons for the defendant, returnable according to law, and endorse the same: Action for money judgment only. Amount

claimed $189,853.88 with interest at the rate of 6% per annum as provided by law on the following sums from the following dates, respectively: On $16,258.35 from January 30, 1924; on $21,221.02 from February 28, 1924; on $24,783.60 from March 28, 1924; on $27,383.15 from April 29, 1924; on $16,773.84 from May 28, 1924; on $12,834.43 from June 27, 1924; on $11,828.40 from July 29, 1924; on $7,736.48 from August 29, 1924; on $10,577.00 from September 29, 1924; on $12,768.27 from October 30, 1924; on $14,910.29 from November 28, 1924; on $12,779.05 from December 30, 1924, and costs.

CHARLES C. NORRIS, JR.,
Philadelphia, Pa., &
F. C. FRIEND,
Counsel for Plaintiff:

Note re exhibit A

Printer's note:

This exhibit being identical with exhibit A attached to petition in case no. 15761, it has been omitted to comply with the rule against duplication (see page 8 of this record.)

163 *Exhibit "B" to petition*

Month of sales	Date of payment	Amount of tax paid
1923, December	1924, January 30	$16,258.35
1924, January	" February 28	21,221.02
" February	" March 28	24,783.60
" March	" April 29	27,383.15
" April	" May 28	16,773.84
" May	" June 27	12,834.43
" June	" July 29	11,828.40
" July	" August 29	7,736.48
" August	" September 29	10,577.00
" September	" October 30	12,768.27
" October	" November 28	14,910.29
" November	" December 30	12,779.05
		$189,853.88

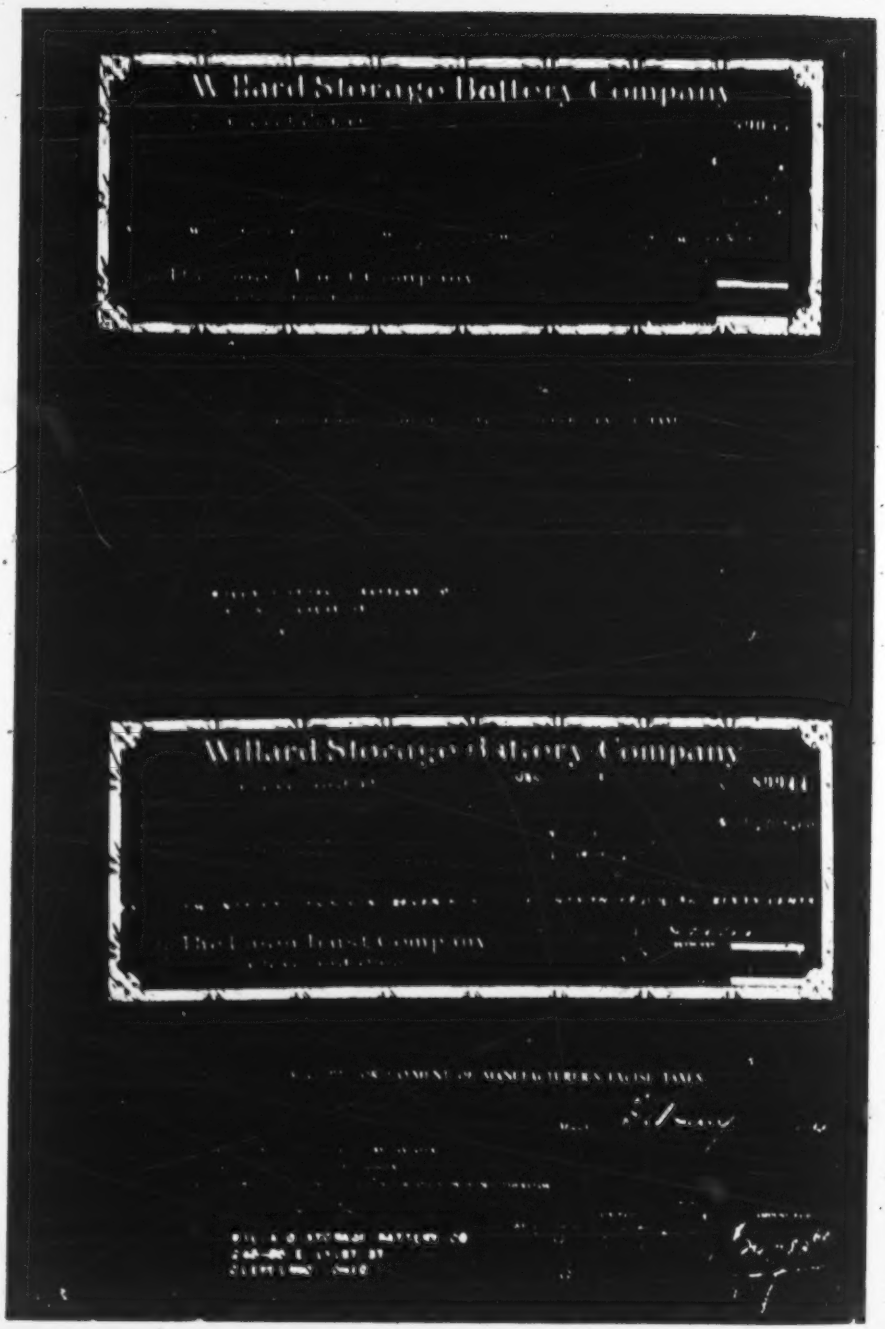
171 *Exhibit "D" to petition*

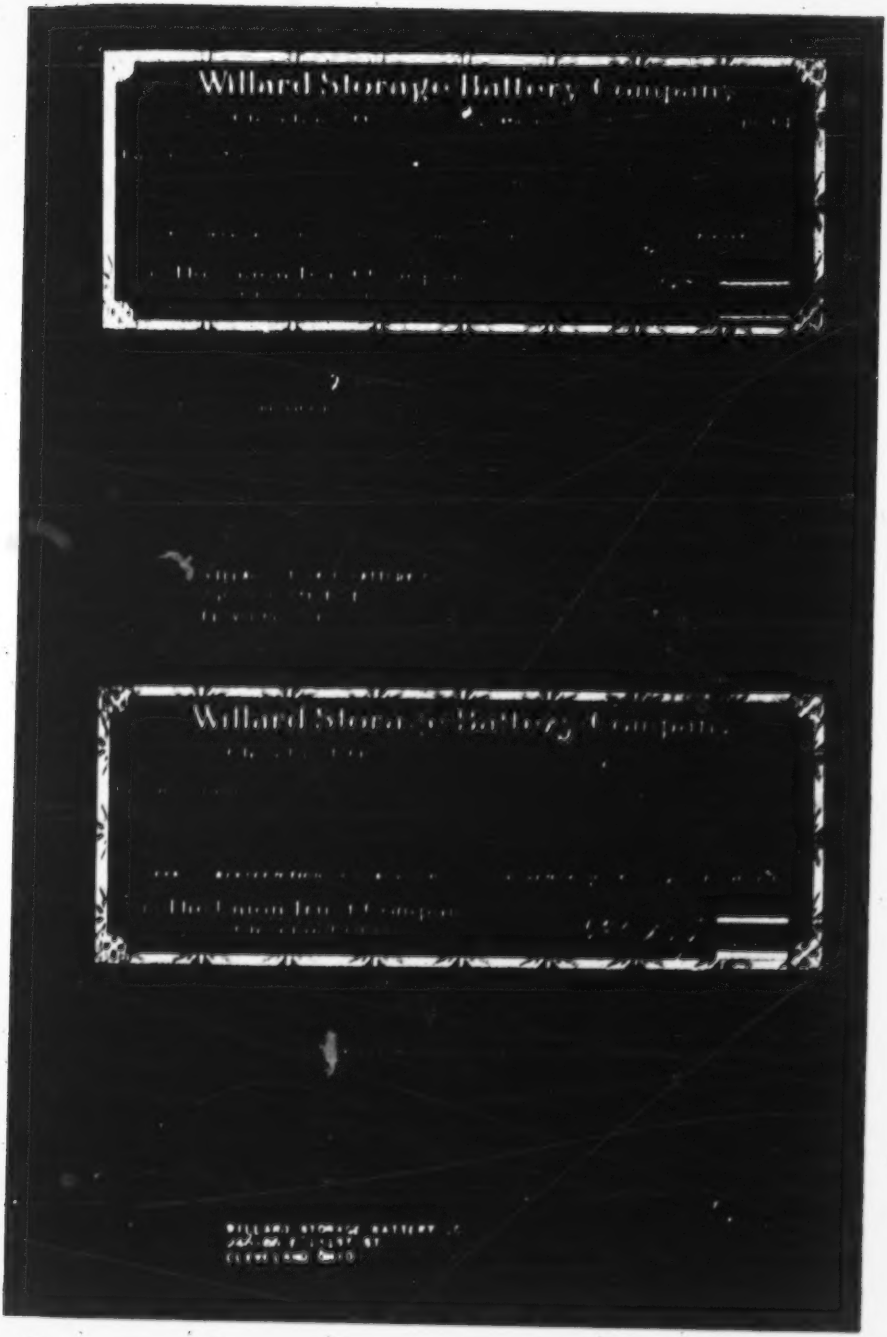
(Execute separate form for each tax period)

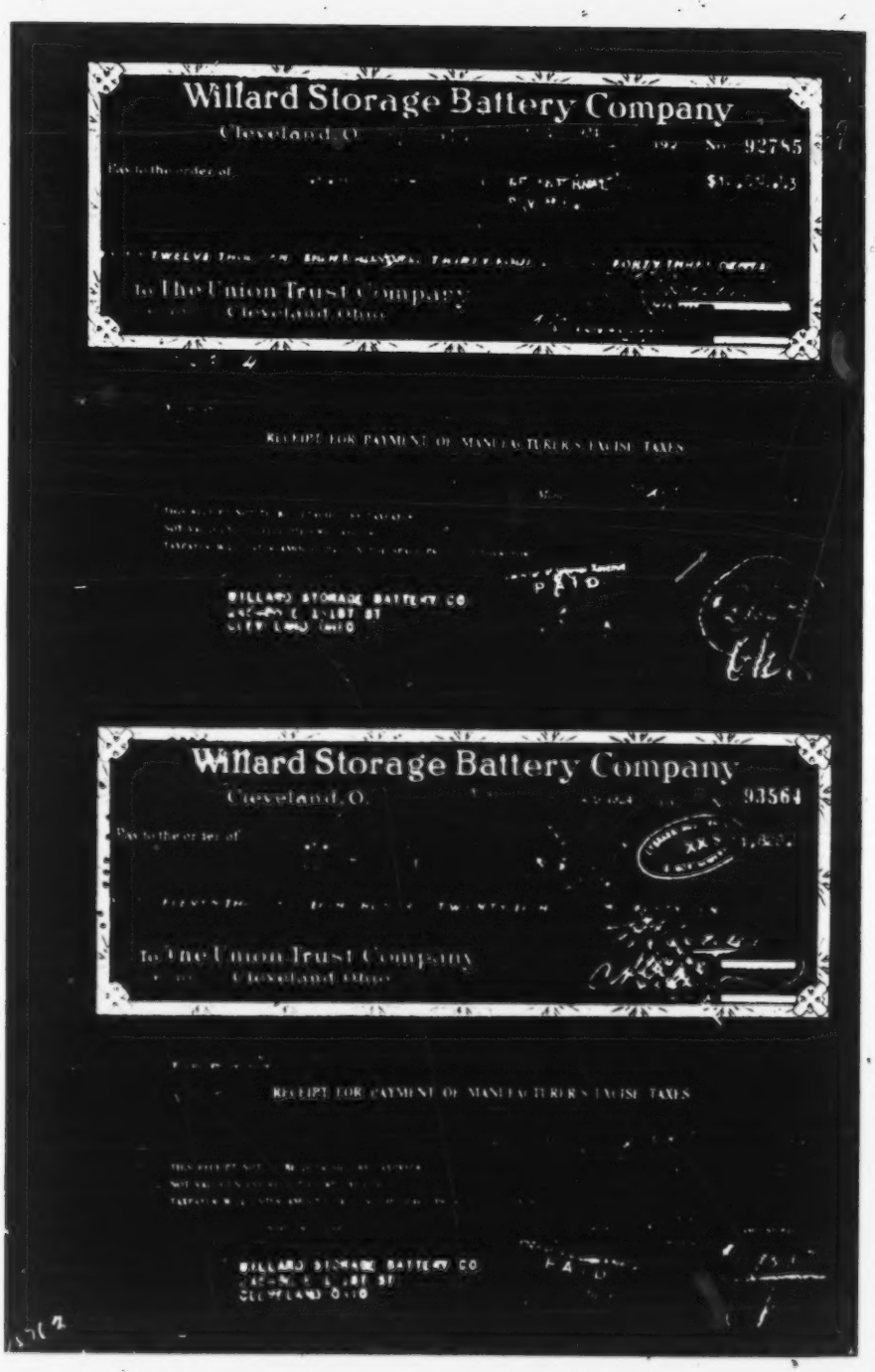
Treasury Department,
Internal Revenue Service,
Form 843—Jan., 1922.
Comptroller General U.S.,
January 18, 1922.

Collector's Notation
District.
Account number.
Date received.
Stamp here.
Collector of Internal Revenue.

Willard


Willard Storage Battery Company
Willard Storage Battery Company


Willard Storage Battery Company
Willard Storage Battery Company



Willard Storage Battery Company

Cleveland, O. 192 No. 92785

Pay to the order of $

to The Union Trust Company

Cleveland, Ohio

RECEIPT FOR PAYMENT OF MANUFACTURERS EXCISE TAXES

WILLARD STORAGE BATTERY CO

CLEVELAND, OHIO

Willard Storage Battery Company

Cleveland, O. 93564

Pay to the order of

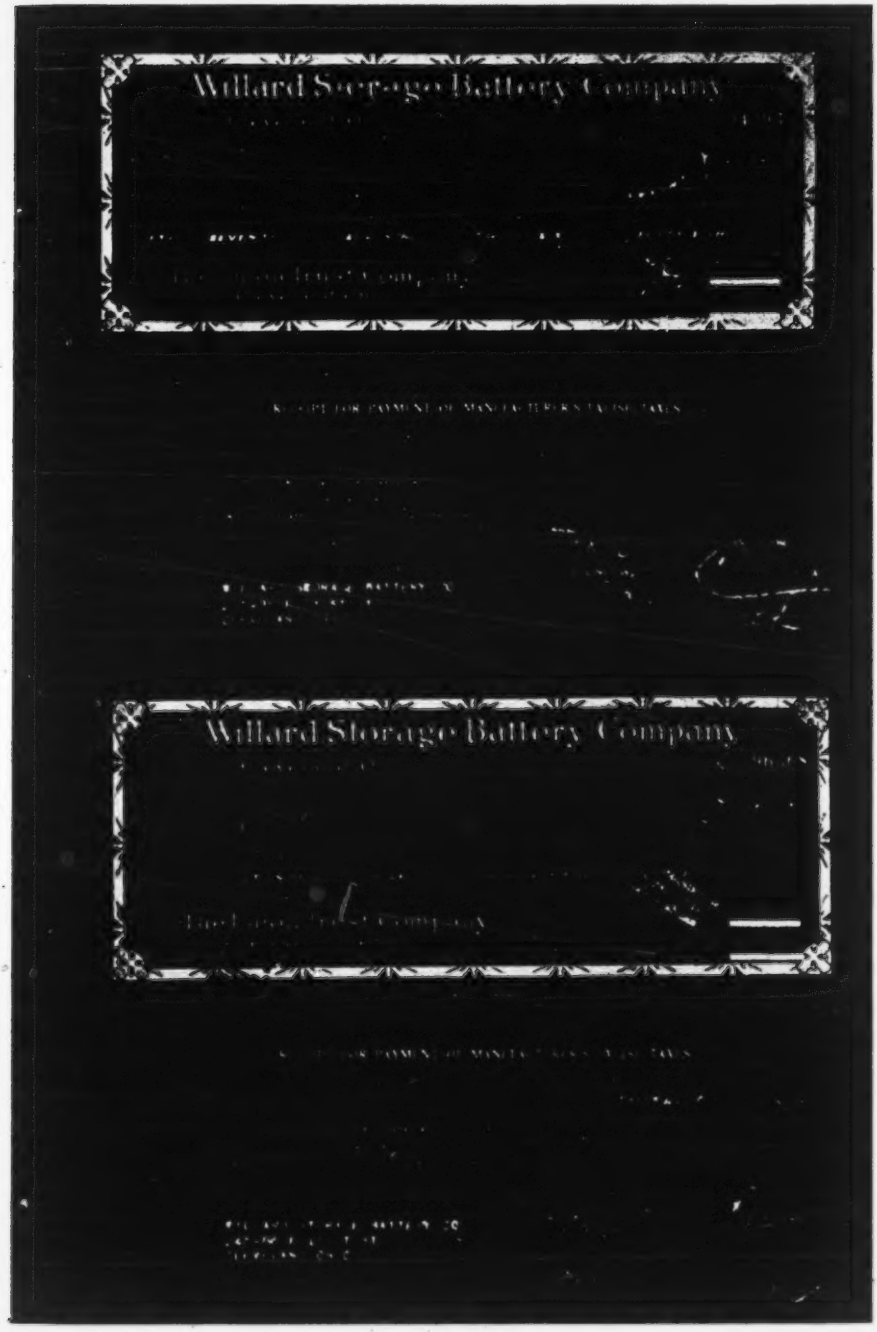
to The Union Trust Company

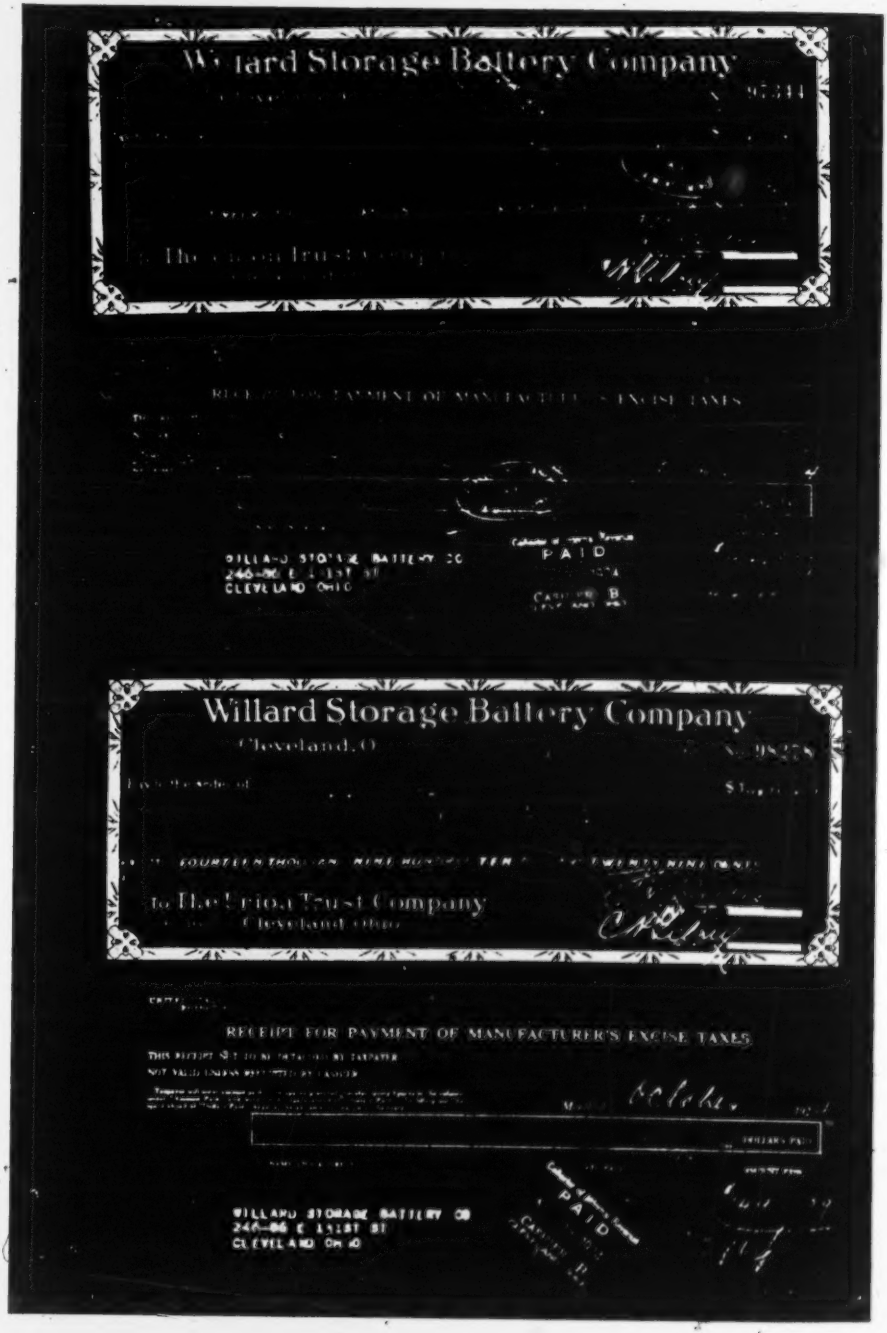
Cleveland, Ohio

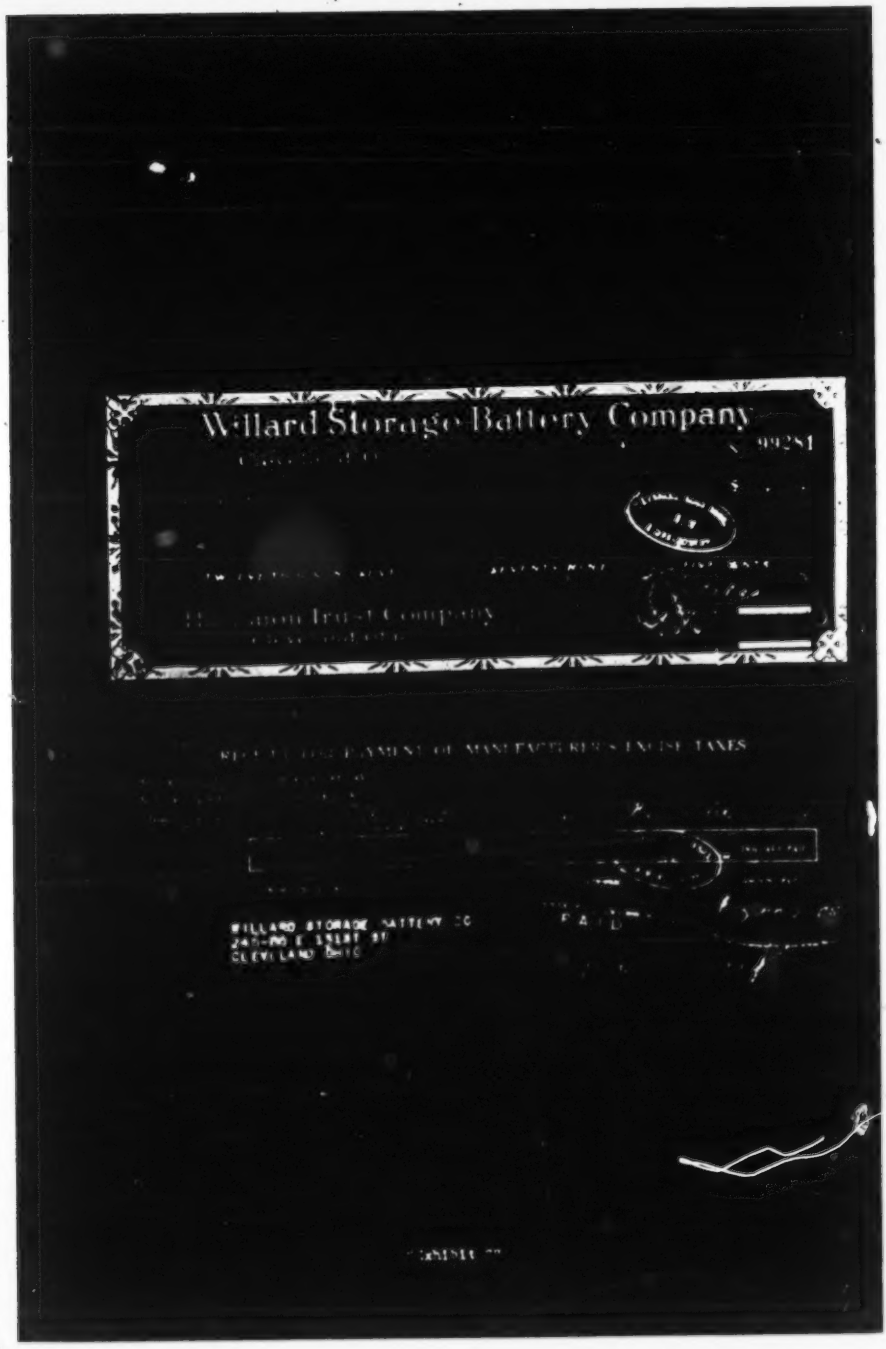
RECEIPT FOR PAYMENT OF MANUFACTURERS EXCISE TAXES

WILLARD STORAGE BATTERY CO

CLEVELAND, OHIO


Willard Storage Battery Company
Willard Storage Battery Company


Willard Storage Battery Company
PAID
Willard Storage Battery Company
Cleveland, O
to The Cleveland Trust Company
Cleveland, Ohio
RECEIPT FOR PAYMENT OF MANUFACTURER'S EXCISE TAXES
WILLARD STORAGE BATTERY CO
246-86 E 131ST ST
CLEVELAND OHIO
PAID


Willard Storage Battery Company
99281
PAID

Claim for

Abatement of Tax assessed.
Credit against outstanding assessments.
× Refund of taxes illegally collected.
Refund of amounts paid for stamps, used in error or excess.

Important — File with collector of internal revenue where assessment was made. Not acceptable unless completely filled in.

Notice to collector — Collector must indicate in block above the kind of claim, except in income-tax cases.

State State of Ohio,
County of Cuyahoga, ss:

Date received by Administrative Unit 10/5/26
Stamp here.

Willard Storage Battery Company

Type or print (Name of taxpayer or purchaser of stamps).
246 East 131st street, Cleveland, Ohio.
(Residence—give street and number as well as city or town and State).
Same (business address).

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

	Period	Year
	From: January 1st,	1924
	To: December 31st,	1924
1. Business in which engaged manufacture of electric storage batteries.		
172 2. Character of assessment or tax manufacturers' excise tax on batteries. (State for or upon what the tax was assessed or the stamps affixed.)		
3. Amount of assessment		$188,448.16
4. Reduction of tax liability requested (income and profit tax)		$
5. Amount to be abated		$
6. Amount to be refunded (or such greater amount as is legally refundable)		$188,448.16
7. Dates of payment (see collector's receipts or indorsements of cancelled checks)		
(If statement covers income-tax liability, items 8–11, inclusive, must be answered.)		
8. District in which return (if any) was filed Cleveland, Ohio.		
9. District in which unpaid assessment appears		
10. Amount of overpayment claimed as credit		$
11. Unpaid assessment against which credit is asked; period from ——— to ———		$

Deponent verily believes that this application should be allowed for the following reasons:

Our returns have been filed monthly and the tax paid as required by regulations. As there is only one question involved we are filing

this claim for refund by calendar years to cover twelve monthly payments in order to cut the records and correspondence to a minimum.

Our request for refund is based upon the fact that storage batteries were in use before the automobile came into existence, that they are used in connection with all kinds of internal-combustion engines, marine, stationary, and portable. While they are used very extensively in automobiles, the same storage batteries are used in motor boats, aeroplanes, farm tractors, road graders, railway locomotive engines, thrashing engines, concrete mixers, water pumps, hoisting machines, electric door bells, radio, laboratory work, and in various other situtaions when small electric power is required.

In view of the above facts, we claim that the collection of the manufacturers' excise tax imposed by Regulations No. 47,
173 under the Revenue Acts of 1918, 1921, and 1924, was a tax illegally collected and as such should be refunded.

(Attach additional sheets if necessary.)

(Signed) F. J. STILES.

Sworn to and subscribed before me this 22nd day of September 1926.

E. L. PETERS,
(Title) *Notary Public.*

(This affidavit may be sworn to before a deputy collector of internal revnue or revenue agent without charge.)

Exhibit "E" to petition

Amended claim

(Execute separate form for each tax period)

Treasury Department.	Collector's notation district.
Internal Revenue Service, Form 843—Jan. 1922.	Account number.
	Date received.
Comptroller General U.S., January 18, 1922.	Stamp here.
	Collector of internal revenue.

Claim for

Abatement of tax assessed.
Credit against outstanding assessments.
× Refund of taxes illegally collected.
Refund of amounts paid for stamps used in error or excess.

Important	Notice to collector
File with collector of internal revenue where assessment was made. Not acceptable unless completely filled in.	Collector must indicate in block above the kind of claim, except in income tax cases.
State of Ohio,	Date received by administrative unit.
County of Cuyahoga, ss:	----------
	Stamp here.

174 Willard Storage Battery Company

Type or print. (Name of taxpayer or purchaser of stamps.)
246 East 131st Street, Cleveland, Ohio.
(Residence—give street and number as well as city or town and State.)
Same (business address).

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

	Period / Year
	From: January 1st, 1924 / To: December 31st, 1924
1. Business in which engaged, manufacture of electric storage batteries.	
2. Character of assessment or tax, manufacturers' excise tax on batteries. (State for or upon what the tax was assessed or the stamps affixed.)	
3. Amount of assessment	$189,853.88
4. Reduction of tax liability requested (income and profits tax)	$----------
5. Amount to be abated	$----------
6. Amount to be refunded (or such greater amount as is legally refundable)	$189,853.88
7. Dated of payment (see collector's receipts or indorsements of canceled checks)	----------
(If statement covers income-tax liability, items 8–11, inclusive, must be answered.)	
8. District in which return (if any) was filed	----------
9. District in which unpaid assessment appears	----------
10. Amount of overpayment claimed as credit	$----------
11. Unpaid assessment against which credit is asked; period from -------- to	$----------

Deponent verily believes that this application should be allowed for the following reasons:

This is an amended claim based on the period in which tax was actually paid. Original claim filed October 5th, 1926, was based on period when tax was due.

(Attached additional sheets if necessary.)

(Signed) F. J. STILES.

175 Sworn to and subscribed before me this 28th day of October, 1926.

(Title)----------

(This affidavit may be sworn to before a deputy collector of internal revenue or revenue agent without charge.)

Exhibit "F" to petition

TREASURY DEPARTMENT.
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington.

Address reply to Commissioner of Internal Revenue, MT:M: WED C1-S-702.

WILLARD STORAGE BATTERY COMPANY,
246 East 131st Street, Cleveland, Ohio.

GENTLEMEN: Reference is made to your claim for refund of $189,853.88 paid as manufacturer's excise tax on automobile parts and accessories.

You were requested to advise within 30 days whether you intended to comply with Treasury Decision 4015 in the prosecution of your claim.

This office is in receipt of your letter dated June 10, 1927, from which it appears that you do not intend to prosecute the matter further along the lines suggested. Your claim is accordingly hereby rejected for lack of evidence.

Respectfully,

C. R. NASH,
Acting Commissioner.

EM

176 In United States District Court

Defendant's motion to dismiss

Filed July 8, 1929, in no. 15763

Now comes Wilfred J. Mahon, United States attorney for the northern district of Ohio, on behalf of the defendant herein, and by leave of court first obtained, moves to dismiss the above-entitled cause upon the grounds and reasons therefor as follows:

1. Because the provisions of section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of refund of manufacturer's excise taxes collected under the provisions of section 900 (3) of the Revenue Act of 1921 and section 600 (3) of the Revenue Act of 1924 in an action instituted subsequent to April 30, 1928.

2. Because the provisions of section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of instituting and maintaining an action, subsequent to May 29, 1928, effective date of the act, for the recovery of manufacturer's excise tax paid under the provisions of section 900 (3) of the Revenue Act of 1921 and section 600 (3) of the Revenue Act of 1924.

3. Because this court is without jurisdiction to review the discretionary power vested in the Commissioner of Internal Revenue by the provisions of section 424 of the Revenue Act of 1928.

4. Because the provisions of section 424 of the Revenue Act of 1928 provided an exclusive remedy.

W. J. MAHON,
United States Attorney.

The plaintiff will take notice that the defendant has filed a motion to dismiss in the above entitled case; that said motion will be on for hearing at such time as the court shall designate.

W. J. MAHON.

Received service of the above motion and notice this 8 day of June, 1929.

CHARLES C. NORRIS, JR., AND F. C. FRIEND,
Attys. for Plff.

177 In United States District Court

Answer

Filed April 12, 1930, in no. 15763

Now comes Wilfred J. Mahon, United States attorney for the Northern District of Ohio, on behalf of the defendant herein, by leave of court first obtained, and for answer to plaintiff's petition admits the corporate capacity of the plaintiff herein; admits that defendant is duly appointed, qualified and acting collector of internal revenue of the United States for the eighteenth district of Ohio, and that the city of Cleveland is located in said district.

Defendant admits the allegations contained in numbered paragraphs 1, 2, and 3 of plaintiff's petition.

Defendant admits all the allegations contained in paragraph 4 of plaintiff's petition admitting also the allegation that all of said sales of electric storage batteries upon which tax was paid, were made to persons other than manufacturers of automobile trucks, automobile wagons, motor cycles, and other automobiles.

Defendant admits the allegations contained in paragraph 5 of plaintiff's petition.

Defendant denies all the allegations contained in paragraph 6 of plaintiff's petition especially that the allegation that said electric storage batteries were commercial commodities and were not specifically designed nor primarily adaptable for use on or in connection with automobile trucks, automobile wagons, motor cycles, and other automobiles.

Defendant denies the allegations contained in paragraphs 7, 8, and 9 of plaintiff's petition.

Defendant admits the allegations contained in paragraph 10 of plaintiff's petition.

Defendant denies the allegations contained in paragraph 11 of plaintiff's petition.

Defendant admits that on October 5, 1926, plaintiff filed with the Commissioner of Internal Revenue, a claim for refund of manufacturers excise taxes collected from plaintiff during the taxable periods beginning January 1, 1924, and ending on December 1, 1924, inclusive, and says that said claim for refund was in the amount of $188,448.16 and that said claim for refund was
178 duly rejected by the Commissioner of Internal Revenue on June 25, 1929. Defendant admits that plaintiff filed with the Commissioner of Internal Revenue, an amended claim for refund of manufacturers excise taxes paid by plaintiff during said taxable periods, and denies that said amended claim for refund was filed on November 3, 1926, but says that said amended claim for refund was filed on October 29, 1926, and that said amended claim for refund was duly rejected by the Commissioner of Internal Revenue on June 21, 1927.

Defendant denies that said manufacturers excise taxes were erroneously and illegally collected.

Defendant denies that there is due plaintiff the sum of $189,853.88 with interest, or any sum whatsoever by reason of payment of manufacturers excise taxes by plaintiff in the premises.

Defendant further says that under the provisions of section 424 of the Revenue Act of 1928, plaintiff is deprived of the right of refund of manufacturers excise taxes collected under the provisions of section 900 (3) of the Revenue Act of 1921, and section 600 (3) of the Revenue Act of 1924 in any action instituted subsequent to April 30, 1928, or in any action instituted subsequent to May 29, 1928; that the provisions of section 424 of the Revenue Act of 1928 vest a discretionary power in the Commissioner of Internal Revenue which this court is without jurisdiction to review; that the provisions of section 424 of the Revenue Act of 1928 provide an exclusive remedy within the Treasury Department of the United States.

Wherefore, defendant prays that plaintiff's petition be dismissed and that he be allowed to go hence with his costs.

WILFRED J. MAHON,
United States Attorney.

[*Duly sworn to by Wilfred J. Mahon; jurat omitted in printing.*]

179 Copy sent counsel for pltff.

W. J. MAHON.

In United States District Court

Order consolidating case no. 15763 with cases nos. 15761-2-4-5 for trial only

Entered May 14, 1931, in no. 15763, by West, Judge

It is ordered that this case be consolidated with cases nos. 15761, 15762, 15764, and 15765, law for trial only.

In United States District Court

Stipulation of facts

Filed May 14, 1931, in no. 15763

It is hereby stipulated by and between the parties hereto, by their respective attorneys, that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true.

1. The Willard Storage Battery Company during the times hereinafter mentioned was and now is a corporation organized,
180 existing and operating under and by virtue of the laws of the State of West Virginia with its principal place of business located at Cleveland, Ohio.

2. The defendant, C. F. Routzahn, during the times hereinafter mentioned was and now is the duly appointed qualified and acting collector of internal revenue for the eighteenth district of Ohio.

3. During the times hereinafter mentioned plaintiff was engaged in the business of manufacturing and selling electric storage batteries.

4. Plaintiff and all the officers thereof have at all times borne true allegiance to the United States of America and have not, nor have any of them in any way voluntarily aided, abetted, or given encouragement to rebellion against the United States and plaintiff is a citizen of the United States, the sole owner of the claim hereinafter stated, no action has been had thereon before Congress or any governmental department, except as hereinafter stated, and no part of which has ever been sold or assigned.

5. Plaintiff filed its manufacturer's excise tax returns monthly for the taxable periods December 1923 to November 1924, inclusive, showing the amount of tax due thereon which was duly assessed on such returns by the Commissioner of Internal Revenue, paid by plaintiff, for the months, in the amounts, and on the dates hereinafter set forth as follows:

Period	Year	Month	Year	Page	Line	Amount	Date paid
Dec.	1923	Jan.	1924	58	1	$16,258.35	1/31/24
Jan.	1924	Feb.	"	57	8	21,221.02	2/29/24
Feb.	"	Mar.	"	50	5	24,783.60	3/29/24
Mar.	"	Apr.	"	53	7	27,383.15	4/30/24
Apr.	"	May	"	53	4	16,773.84	5/29/24
May	"	June	"	51	7	12,834.43	6/28/24
June	"	July	"	48	6	11,828.40	7/30/24
July	"	Aug.	"	36	4	7,736.48	8/30/24
Aug.	"	Sept.	"	24	1	10,577.00	9/30/24
Sept.	"	Oct.	"	28	3	12,768.27	10/31/24
Oct.	"	Nov.	"	22	9	14,910.29	11/29/24
Nov.	"	Dec.	"	28	6	12,779.05	12/31/24

6. On October 5, 1926, plaintiff filed its claim for refund no. 21167 of manufacturer's excise tax so paid on the manufacture
181 and sale of electric storage batteries for the taxable periods January 1924 to December 1924, inclusive, in the amount of

$188,448.16, which was duly rejected by the Commissioner of Internal Revenue on June 25, 1929.

7. On Ocober 29, 1926, plaintiff filed its claim for refund no. 702 of manufacturer's excise tax so paid on the manufacture and sale of electric storage batteries for the taxable periods December 1923 to November 1924, inclusive, in the amount of $189,853.88, which was duly rejected by the Commissioner of Internal Revenue on June 21, 1927.

8. Duly certified photostat copies of returns, claims for refund, claims for credit, claims for abatement, waivers, assessments, reports, letters, and other departmental records pertinent to the issues in this case shall be admitted and received in evidence the same as if the originals thereof were properly identified and admitted, subject only to the right of either party to object because of their irrelevancy or immateriality.

WILLARD STORAGE BATTERY COMPANY,
By CHARLES C. NORRIS, Jr.,
Attorneys for Plaintiff.
C. F. ROUTZAHN, *Collector*,
By W. J. MAHON,
U.S. Attorney for Defendant.
By JOHN B. OSMUN, *Asst. U.S. Atty.*
E. F. McMAHON, *Special Atty.*

182 In United States District Court

Jury waived; trial in progress; portion of plaintiff's testimony adduced; adjournment to May 15, 1931

Entered May 14, 1931, in no. 15763, by West, judge

This day came the parties by their attorneys and a jury having been waived, this cause came on to be heard by the court on the pleadings and the evidence and the court having heard a part of the testimony adduced on behalf of the plaintiff, and the hour for adjournment having arrived, the further trial of this cause was postponed until tomorrow morning at 9:30 o'clock.

In United States District Court

Trial in progress; plaintiff's testimony concluded; defendant's testimony concluded; cause taken under advisement by the court

Entered May 15, 1931, in no. 15763, by West, judge

This day again came the parties by their attorneys and a jury having been waived, this cause came on to be heard by the court on the pleadings and the evidence, and the court having heard all of

the testimony adduced on behalf of the parties, took the cause under advisement.

183 IN UNITED STATES DISTRICT COURT

Waiver of jury

Filed March 9, 1931, in no. 15763

We, the attorneys for the respective parties, hereby waive the trial to the jury of this cause, and agree to submit the same to the court without the intervention of a jury.

TOLLES, HOGSETT & GINN,
Attorneys for Plaintiff.
WILFRED J. MAHON,
Attorney for Defendant.

IN UNITED STATES DISTRICT COURT

Order of judgment

Entered Oct. 27, 1931, in no. 15763, by West, Judge

This cause coming on to be heard upon the pleadings, the evidence and the argument of counsel, the court having made special findings of fact and conclusions of law in this and four other cases consolidated herewith, which findings of fact and conclusions of law are hereby referred to, on due consideration of the premises, it is

Ordered, decreed, and adjudged that the plaintiff recover from the defendant the sum of $189,853.88, together with interest on the following amounts of taxes paid from the following respective dates of payment at the rate of 6% per annum to a date set by the Commissioner of Internal Revenue of the United States, such date to be not more than 30 days earlier than that of the refund check, to wit:

184 $16,258.35 from January 31, 1924; $21,221.02 from February 29, 1924; $24,783.60 from March 29, 1924; $27,383.15 from April 30, 1924; $16,773.84 from May 29, 1924; $12,834.43 from June 28, 1924; $11,828.40 from July 30, 1924; $7,736.48 from August 30, 1924; $10,577.00 from September 30, 1924; $12,768.27 from October 31, 1924; $14,910.29 from November 29, 1924; $12,779.05 from December 31, 1924.

It is further ordered that plaintiff recover its costs herein expended, taxed at $------

Defendant is allowed his exceptions to this judgment and to said findings of fact and conclusions of law.

Approved:

W. J. MAHON, *U. S. Atty.*

IN UNITED STATES DISTRICT COURT

Certificate of probable cause

Filed Oct. 27, 1931, in no. 15763

The court having rendered judgment herein in favor of the plaintiff in the amount of $189,853.88, together with interest and costs, said judgment being against C. F. Routzahn, a duly appointed, qualified and acting collector of internal revenue, upon consideration of the evidence, the court finds and hereby certifies that the said judgment is for the recovery of money collected by
185 the said defendant as collector of internal revenue and by him paid into the Treasury of the United States in the performance of his official duties with reference to the collection of income, excise and profits taxes, and that there was probable cause for the act so done by the said defendant collector, by reason whereof the judgment herein was rendered.

S. H. WEST,
United States District Judge.

In United States District Court

Petition

Filed May 31, 1929, in no. 15764

This petition is filed by the plaintiff, Willard Storage Battery Company, a corporation, against the defendant, C. F. Routzahn, collector of internal revenue of the United States for the 18th district of Ohio, to recover the sum of $173,934.45, with interest as hereinafter set forth, upon the cause of action of which the following is a statement:

1. Prior to December 1, 1924, and from that time to the present, the plaintiff was, and now is, a corporation organized and existing under the laws of the State of West Virginia, and during that time had and maintained, and now has and maintains, its manufacturing plant and principal place of business at 246 East 131st Street, in the city of Cleveland, in the State of Ohio, and at all times has been, and now is, a resident of the city of Cleveland, in the State of Ohio, in the United States of America.

2. On or about December 1, 1924, and continuously from that date to the present, the said C. F. Routzahn was the duly appointed collector of internal revenue of the United States for the eight-
186 eenth district of Ohio, in which is located the city of Cleveland, in the State of Ohio, and at all times herein mentioned was, and now is, a citizen and resident of the northern district of Ohio, eastern division.

3. Prior to December 1, 1924, and from that date continuously to the present time, the plaintiff has been, and now is, engaged in the manufacture and sale of electric storage batteries at its said plant at No. 246 East 131st Street in the city of Cleveland aforesaid.

4. In each calendar month during the period beginning on December 1, 1924, and ending on November 30, 1925, the plaintiff made sales of electric storage batteries, all of which sales were made to persons other than manufacturers of automobile trucks, automobile wagons, other automobiles or motorcycles, and on or before the last day of the calendar month then immediately succeeding each of the said months in which the said sales were made, in accordance with the requirements, and upon the demand of, the defendant made a return in accordance with the provisions of title VI, section 600 of the United States Revenue Act of 1924, of the computation of manufacturer's excise taxes at the rate of two and one half (2½) per centum of the selling prices of the said electric storage batteries upon the sales thereof made by the plaintiff in each immediately preceding calendar month. The forms for the said returns were substantially alike, but were revised from time to time during the said period by the Commissioner of Internal Revenue; and, when filled in and made by the plaintiff, were delivered to the defendant by the plaintiff. The amount of the said manufacturer's excise tax was set forth in each of the said returns in a single sum, and represented the computation of two and one half (2½) per centum upon the selling price of the said electric storage batteries which had been sold by the plaintiff during the then preceding calendar month. A true copy of one of the said returns is hereunto attached, marked "Exhibit A" and made part hereof, and is submitted as a sample of, except as the same was revised as aforesaid, all such returns made by the plaintiff.

5. Heretofore, to wit, on the dates set forth in a statement thereof hereunto attached, marked "Exhibit B" and made part hereof, the plaintiff paid to the defendant, and the defendant collected
187 from the plaintiff, the sums of money set opposite each of the several dates as set forth in "Exhibit B", which said sums of money amounted in the aggregate to the sum of $173,934.45, and were paid by the plaintiff upon the demand of the defendant as manufacturer's excise taxes upon the selling price of electric storage batteries which were manufactured by the plaintiff, and sold by the plaintiff during the respective calendar months set opposite the said several dates respectively set forth in exhibit B. All of said payments of taxes were made contemporaneously with, and in accordance with, the computation of the said excise taxes as set forth in the returns made by the plaintiff as hereinbefore described.

6. The electric storage batteries upon the selling prices of which the said taxes were paid by the plaintiff, as hereinbefore set forth, were commercial commodities, and were not specifically designed, nor

primarily adaptable, only for use on, or in connection with, automobile trucks, automobile wagons, other automobiles or motorcycles, but were interchangeable for use in stationary and portable engines, and were, and are, extensively used in many industries other than the automobile truck, automobile wagon, other automobile and motorcycle industries.

7. The electric storage battery of the kind sold by the plaintiff during the period between December 1, 1924, and November 30, 1925, and upon the selling prices of which the said taxes were paid by the plaintiff upon the demand of the defendant, as hereinbefore set forth, was in general commercial use for many years before automobiles and automobile trucks and wagons came into existence, and were first used in the United States as a commercial commodity in or about the year 1859. In, or about, the year 1894, electric storage batteries were first used on, or in connection with, electric automotive vehicles only, and it was not until in, or about, the year 1911 that they were used on, or in connection with, automobile trucks, other automobiles or motorcycles (other than electric vehicles) and then only for the purpose of lighting. In, or about, the year 1915, electric storage batteries were first used on, or in connection with, automobiles other than electric vehicles, for purposes other than lighting.

188 8. The electric storage battery of the kind sold by the plaintiff during the aforesaid period, and upon the selling prices of which the said manufacturer's excise taxes were paid by the plaintiff upon the demand of the defendant, as hereinbefore set forth, is used, and for many years has been used, extensively in connection with motor boats, airplanes, tractors, locomotive engines, mine engines, submarines, artillery-gun firing, lighting, turret lighting and auxiliary power, signalling devices in railroad systems and in military service, searchlights, telephone service, isolated lighting and power plants, street railways, fire-alarm service, radio, and in a great many other industries and for a great many other purposes too numerous to mention.

9. The electric storage batteries which were sold by the plaintiff during the period beginning on December 1, 1924, and ending on November 30, 1925, as aforesaid, did not constitute parts or accessories for any of the articles enumerated in subdivision (1) or (2) of title VI, section 600 of the United States Revenue Act of 1924, and neither said batteries or the sale thereof by the plaintiff were subject to the manufacturer's excise tax provided therein, and the defendant erroneously and illegally collected from the plaintiff as such, manufacturer's excise taxes upon said sales the sum of $173,954.45 as set forth in exhibit B hereunto attached.

10. There are attached hereto, marked "Exhibit C", and made part hereof, true and correct copies of the original receipts executed by the defendant for the taxes paid in each calendar month by

the plaintiff to, and upon the demand of, the defendant, as hereinbefore set forth, and true and correct copies of the checks of the plaintiff which were paid to and upon the demand of the defendant, and represented th epayment of the taxes as set forth in the said receipts and upon each of which said checks appears the number imposed thereon by the defendant.

11. All of the taxes hereinbefore set forth were paid by the plaintiff upon the demand of the defendant, and were paid by the plaintiff upon the demand of the defendant under protest, as not being due or payable upon the sales of the electric storage batteries manufactured and sold by the plaintiff, as aforesaid.

12. Heretofore, to wit, October 5, 1926, the plaintiff duly
189 filed with the Commissioner of Internal Revenue of the United States a claim for the refund of the said manufacturer's excise taxes erroneously and illegally collected by the defendant from the plaintiff during the period beginning January 1, 1925, and ending on December 31, 1925, a true copy of which said claim is hereunto attached, marked "Exhibit D" and made part hereof; and thereafter, to wit, on or about November 3, 1926, the plaintiff filed with the Commissioner of Internal Revenue an amended claim for the refund of the said taxes erroneously and illegally collected by the defendant from the plaintiff during the period aforesaid, a true copy of which amended claim of refund is hereunto attached, marked "Exhibit E" and made part hereof. The said Commissioner of Internal Revenue, on or about June 21, 1927, rejected the said claim by letter bearing said date, a true copy of which said letter is hereunto attached, marked "Exhibit F" and made part hereof.

13. There is justly due by the defendant to the plaintiff, and the plaintiff prays that judgment may be entered in favor of the plaintiff and against the defendant in the sum of $173,934.45, with interest upon each of the payments of the said manufacturer's excise taxes as set forth in exhibit B hereunto attached from the respective dates of such payments and for its costs herein expended.

WILLARD STORAGE BATTERY COMPANY,
CHARLES C. NORRIS, Jr., *Philadelphia, Pa.*
By F. C. FRIEND, *its Attorneys.*

[*Duly sworn to by C. H. Gibney, jurat omitted in printing.*]

190 PRAECIPE

To the Clerk of the Said Court:

Issue summons for the defendant, returnable according to law, and endorse the same: Action for money judgment only. Amount claimed $173,934.45 with interest at the rate of 6% per annum as provided by law on the following sums from the following dates re-

spectively: On $14,852.63 from January 29, 1925; on $8,363.97 from February 27, 1925; on $11,588.18 from March 30, 1925; on $11,923.08 from April 29, 1925; on $6,639.61 from May 28, 1925; on $6,635.54 from June 29, 1925; on $7,861.95 from July 30, 1925; on $15,760.86 from August 28, 1925; on $18,811.15 from September 29, 1925; on $22,705.71 from October 30, 1925; on $25,802.53 from November 30, 1925; on $21,989.24 from December 30, 1925, and costs.

CHARLES C. NORRIS, Jr.,
Philadelphia, Pa.
F. C. FRIEND,
Counsel for Plaintiff.

Note re exhibit A

Printer's note:

This exhibit being identical with exhibit A, attached to petition in case no. 15761, it has been omitted to comply with the rule against duplication. (See page 8 of this record.)

Exhibit "B" to petition

Month of sales	Date of payment	Amount of tax paid
1924 December	1925 January 29	$14,852.63
1925 January	" February 27	8,363.97
" February	" March 30	11,588.18
" March	" April 29	11,923.08
" April	" May 28	6,639.61
" May	" June 29	6,635.54
" June	" July 30	7,861.95
" July	" August 28	15,760.86
" August	" September 29	18,811.15
" September	" October 30	22,705.71
" October	" November 30	26,802.53
" November	" December 30	21,989.24
		173,934.45

198 *Exhibit "D" to petition*

(Execute separate form for each tax period)

Treasury Department
Internal Revenue Service
Form 843—Jan., 1922
Comptroller General U.S.
January 18, 1922

Collector's notation
District
Account number
Date received
Stamp here
Collector of
internal revenue

EXHIBIT-C

Willard Storage Battery Company

Cleveland, O. [illegible] 21[illegible] No. 99894

Pay to the order of [illegible] $[illegible]

[illegible] FOURTEEN THOUSAN[illegible] DOLLARS

To The Union Trust Company
Cleveland Ohio

[illegible]

RECEIPT FOR PAYMENT OF MANUFACTURER'S EXCISE TAXES

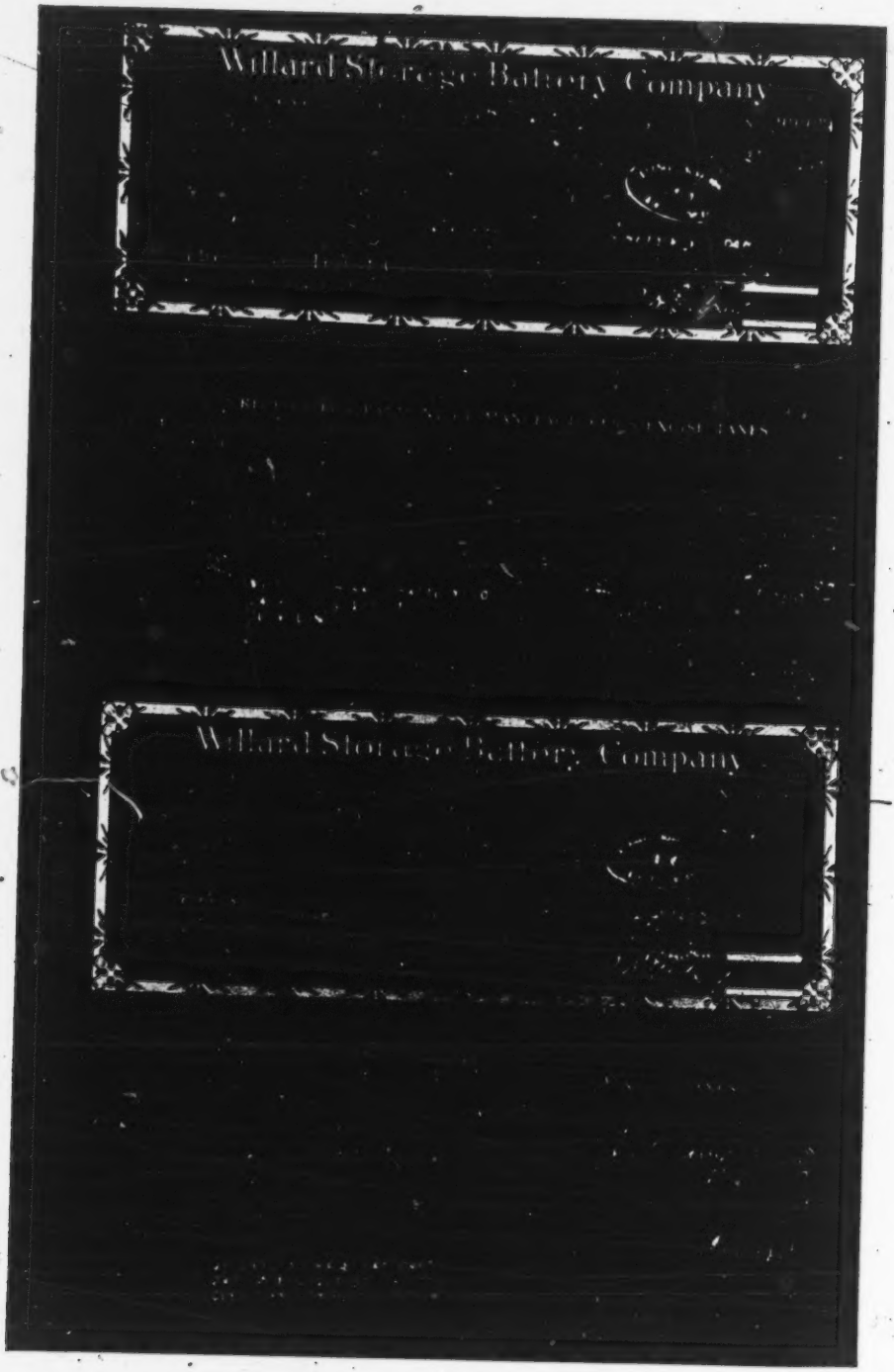
[illegible]

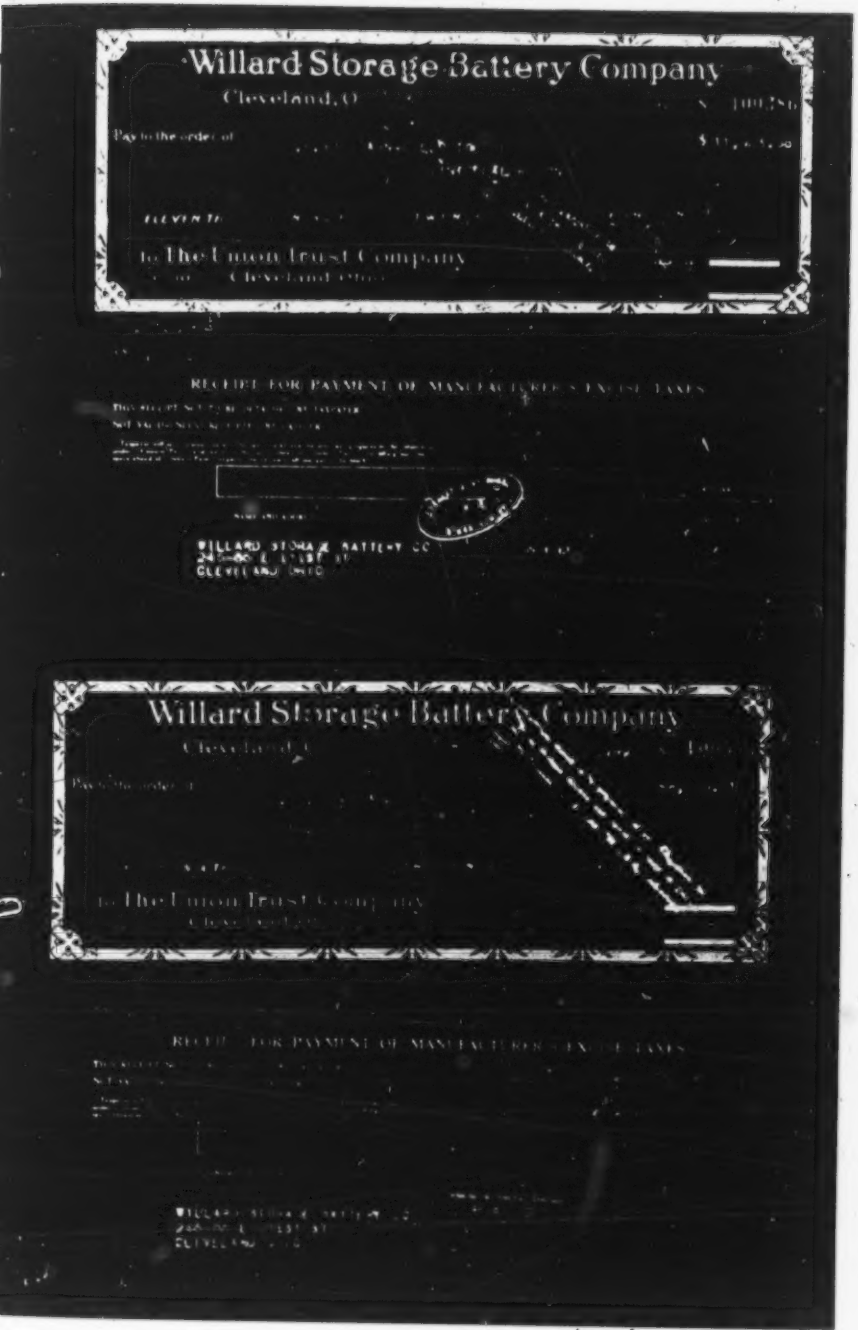
WILLARD STORAGE BATTERY CO
240[illegible] E 152ST ST
[illegible]

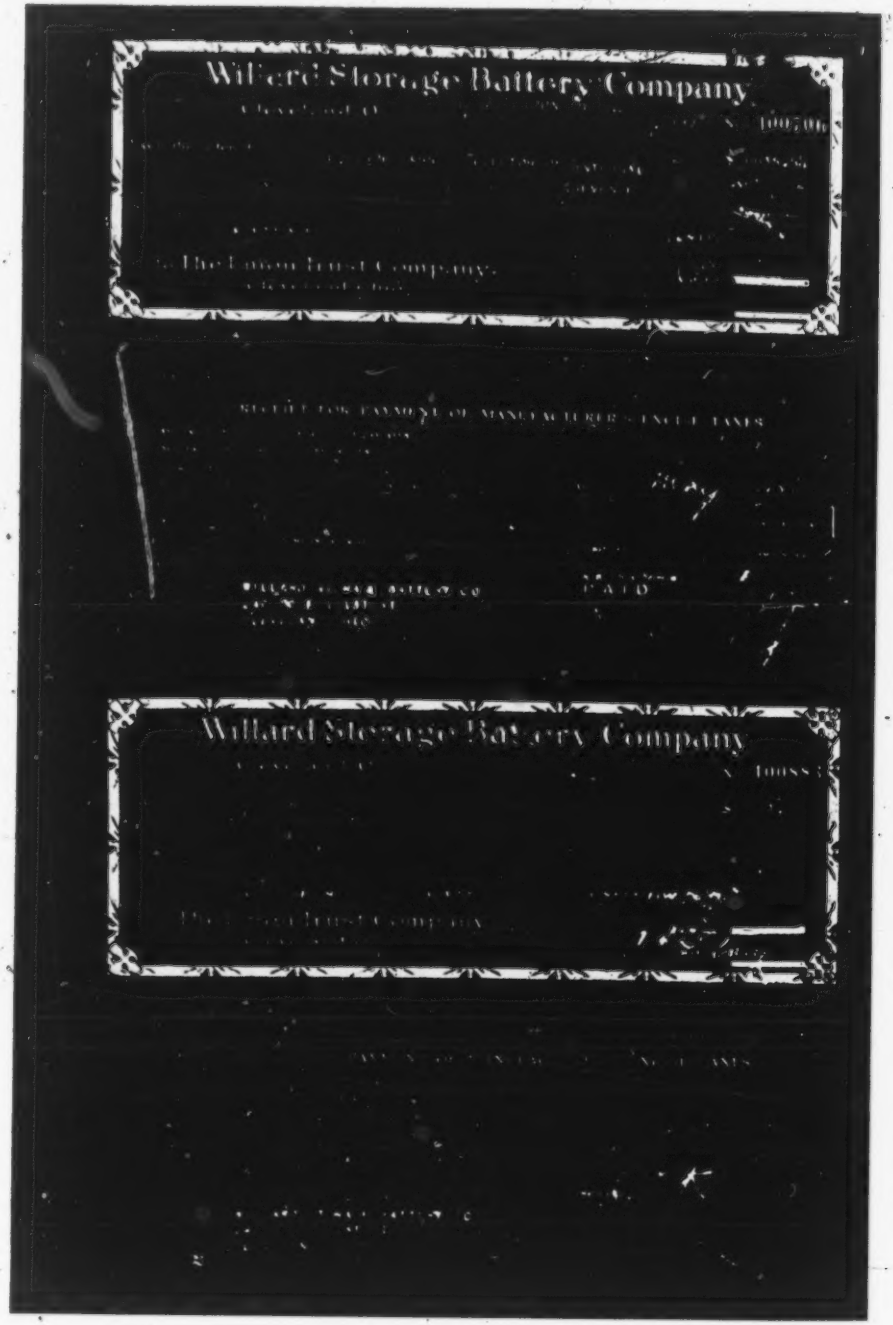
PAID

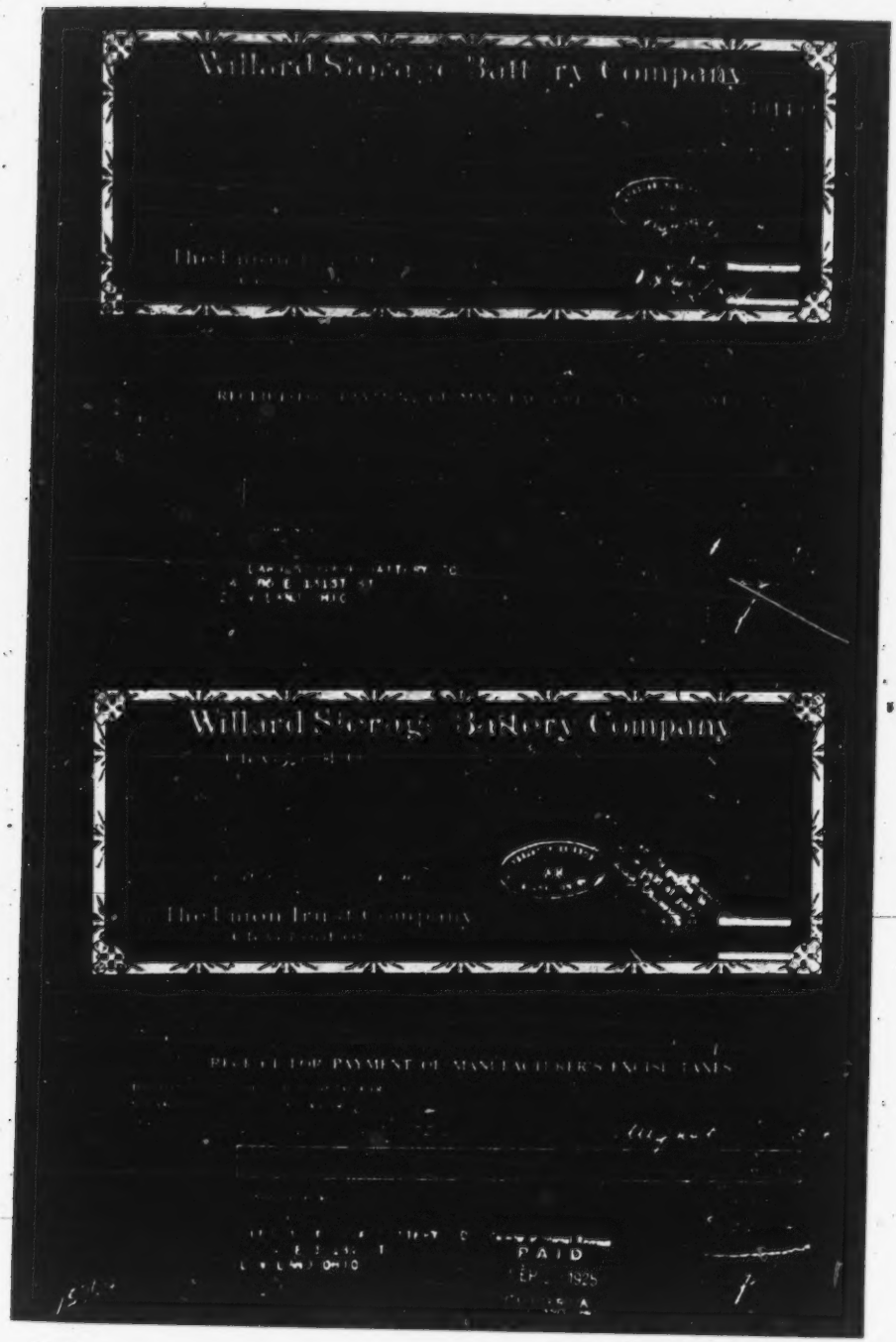
[illegible] 63

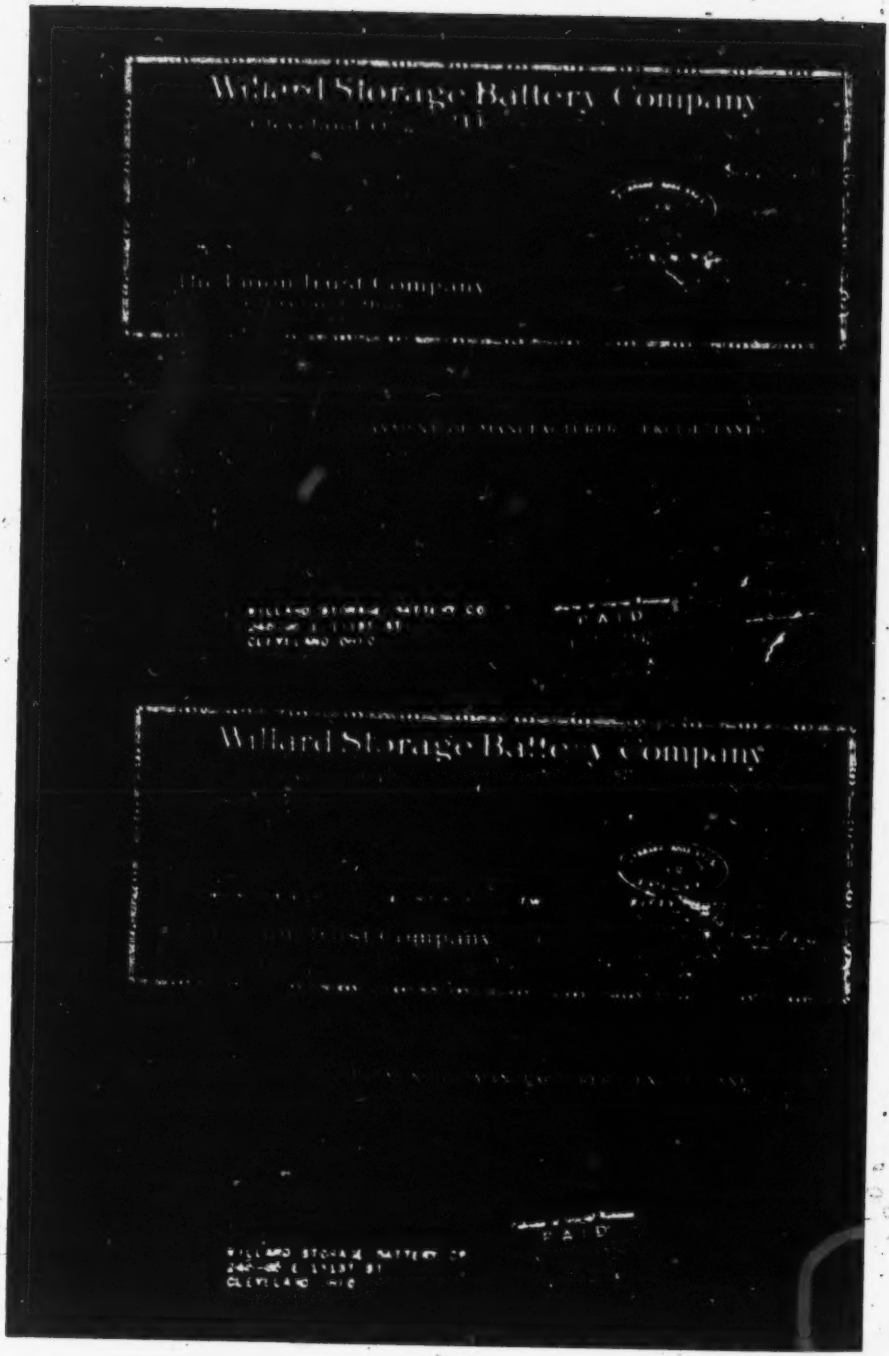
Exhibit C


Willard Storage Battery Company
Willard Storage Battery Company


Willard Storage Battery Company
Cleveland, O.
Pay to the order of
ELEVEN
to The Union Trust Company
Cleveland
RECEIPT FOR PAYMENT OF MANUFACTURERS EXCISE TAXES
WILLARD STORAGE BATTERY CO
CLEVELAND, OHIO
Willard Storage Battery Company
Cleveland, O.
to The Union Trust Company
Cleveland


Willard Storage Battery Company
Willard Storage Battery Company


Willard Storage Battery Company
Willard Storage Battery Company
The Union Trust Company
PAID


Willard Storage Battery Company
PAID
Willard Storage Battery Company
PAID

Claim for

Abatement of tax assessed.
Credit against outstanding assessments.
× Refund of taxes illegally collected.
Refund of amounts paid for stamps used in error or excess.

Important

File with collector of internal revenue where assessment was made. Not acceptable unless completely filled in.

Notice to collector

Collector must indicate in block above the kind of claim, except in income tax cases.

State of Ohio,
County of Cuyahoga, ss:

Date received by Administrative Unit
10/5/26
Stamp here

Willard Storage Battery Company

Type or print. (Name of taxpayer or purchaser of stamps.)
246 East 131st Street, Cleveland, Ohio.
(Residence—give street and number as well as city or town and State.)
Same (business address.)

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

		Period From: January 1st, 1924 To: December 31st, 1925 Year
199	1. Business in which engaged manufacture of electric storage batteries	
	2. Character of assessment of tax, manufacturers' excise tax on batteries	
	(State for or upon what the tax was assessed or the stamps affixed.)	
	3. Amount of assessment	$175,875.19
	4. Reduction of tax liability requested (income and profits tax)	$
	5. Amount to be abated	$
	6. Amount to be refunded (or such greater amount as is legally refundable)	$175,875.19
	7. Dates of payment (see collector's receipts or indorsements of canceled checks	
	(If statement covers income-tax liability, items 8–11, inclusive, must be answered.)	
	8. District in which return (if any) was filed, Cleveland, Ohio.	
	9. District in which unpaid assessment appears	
	10. Amount of overpayment claimed as credit	$
	11. Unpaid assessment against which credit is asked; period from ——— to	$

Deponent verily believes that this application should be allowed for the following reasons:

Our returns have been filed monthly and the tax paid as required by regulations. As there is only one question involved we are filing this claim for refund by calendar years to cover twelve monthly payments in order to cut the records and correspondence to a minimum.

Our request for refund is based upon the fact that storage batteries were in use before the automobile came into existence, that they are used in connection with all kinds of internal combustion engines, marine, stationary and portable. While they are used very extensively in automobiles, the same storage batteries are used in motor boats, aeroplanes, farm tractors, road graders, railway locomotive engines, threshing engines, concrete mixers, water pumps, hoisting machines, electric door bells, radios, laboratory work, and in various other situations when small electric power is required.

290 In view of the above facts we claim that the collection of the manufacturers' excise tax imposed by Regulations No. 47, under the Revenue Acts of 1918, 1921, and 1924, was a tax illegally collected, and as such should be refunded.

(Attach additional sheets if necessary.)

(Signed) F. J. SMILES.

Sworn to and subscribed before me this 22nd day of September 1926.

E. L. PERRIN,
(Title) *Notary Public.*

(This affidavit may be sworn to before a deputy collector of internal revenue or revenue agent without charge.)

Exhibit "E" to petition

(Execute separate form for each tax period)

Treasury Department
Internal Revenue Service
Form 843—Jan., 1922
Comptroller General U.S.
January 18, 1922

Collector's notation
District
Account number
Date received
Stamp here
Collector of
Internal Revenue

Claim for

Abatement of tax assessed.
Credit against outstanding assessments.
Refund of taxes illegally collected.
Refund of amounts paid for stamps used in error or excess.

Important

File with collector of internal revenue where assessment was made. Not acceptable unless completely filled in.

Notice to collector

Collector must indicate in block above the kind of claim except in income-tax cases.

201 State of Ohio, County of Cuyahoga, ss:

Date received by Administrative Unit

Stamp here

Willard Storage Battery Company

(Name of taxpayer or purchaser of stamps.)

Type or print. 216 East 131st Street, Cleveland, Ohio.

(Residence—give street and number as well as city or town and State.)

Same (business address).

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

	Period From January 1st, 1925 To December 31st, 1925 Years
1. Business in which engaged—manufacture of electric storage batteries	
2. Character of assessment or tax—manufacturers' excise tax on batteries (State for or upon what the tax was assessed or the stamps affixed.)	
3. Amount of assessment	$173,934.45
4. Reduction of tax liability requested (income and profits tax)	$
5. Amount to be abated	$
6. Amount to be refunded (or such greater amount as is legally refundable)	$173,934.45
7. Dates of payment (see collector's receipts or indorsements of canceled checks) (If statement covers income tax liability, items 8 to 11, inclusive, must be answered.)	
8. District in which return (if any) was filed	
9. District in which unpaid assessment appears	
10. Amount of overpayment claimed as credit	$
11. Unpaid assessment against which credit is asked; period from ——— to ———	$

202 Deponent verily believes that this application should be allowed for the following reasons:

This is an amended claim based on the period in which tax was actually paid. Original claim filed October 5th, 1926, was based on period when tax was due.

(Attach additional sheets if necessary.)

(Signed) F. J. STILES.

Sworn to and subscribed before me this 28th day of October, 1926.

(Title) ---

(This affidavit may be sworn to before a deputy collector of internal revenue or revenue agent without charge.)

Exhibit "F" to petition

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, June 21, 1927.

Address reply to Commissioner of Internal Revenue and refer to MT:M:WED. C1-S-703.

WILLARD STORAGE BATTERY COMPANY,
246 East 131st Street, Cleveland, Ohio.

GENTLEMEN: Reference is made to your claim for refund of $173,934.45 paid as manufacturer's excise tax on automobile parts and accessories.

You were requested to advise within 30 days whether you intended to comply with Treasury Decision 4015 in the prosecution of your claim.

This office is in receipt of your letter dated June 10, 1927,
203 from which it appears that you do not intend to prosecute the matter further along the lines suggested. Your claim is accordingly hereby rejected for lack of evidence.

Respectfully,

EM

C. R. NASH,
Acting Commissioner.

In United States District Court

Motion to dismiss

Filed July 8, 1929, in no. 15764

Now comes Wilfred J. Mahon, United States attorney for the northern district of Ohio, on behalf of the defendant herein, and by leave of court first obtained, moves to dismiss the above entitled cause upon the grounds and reasons therefor as follows:

1. Because the provisions of section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of refund of manufacturer's excise taxes collected under the provisions of section 900 (3) of the Revenue Act of 1921 and section 600 (3) of the Revenue Act of 1924 in an action instituted subsequent to April 30, 1928.

2. Because the provisions of section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of instituting and maintaining an action, subsequent to May 29, 1928, effective date of the act, for the recovery of manufacturer's excise tax paid under the provisions of section 900 (3) of the Revenue Act of 1921 and section 600 (3) of the Revenue Act of 1924.

3. Because this court is without jurisdiction to review the
204 discretionary power vested in the Commissioner of Internal Revenue by the provisions of section 424 of the Revenue Act of 1928.

4. Because the provisions of section 424 of the Revenue Act of 1928 provides an exclusive remedy.

W. J. MAHON,
United States Attorney.

The plaintiff will take notice that the defendant has filed a motion to dismiss in the above entitled case; that such motion will be on for hearing at such time as the court shall designate.

W. J. MAHON.

Received service of the above motion and notice this 8 day of June, 1929.

CHARLES C. NORRIS, Jr., and F. C. FRIEND,
Attys. for Plff.

In United States District Court

Answer

Filed April 12, 1930, in no. 15764

Now comes Wilfred J. Mahon, United States attorney for the northern district of Ohio, on behalf of th defendant herein, by leave of court first obtained, and for answer to plaintiff's petition admits the corporate capacity of the plaintiff herein; admits that defendant is the duly appointed, qualified, and acting collector of internal revenue of the United States for the eighteenth district of Ohio, and that the city of Cleveland is located in said district.

205 Defendant admits the allegations contained in numbered paragraphs 1, 2, and 3 of plaintiff's petition.

Defendant admits all the allegations contained in paragraph 4 of plaintiff's petition including the allegation that all of said sales of electric storage batteries upon which tax was paid were made to persons other than manufacturers of automobile trucks, automobile wagons, motorcycles, and other automobiles.

Defendant admits the allegations contained in paragraph 5 of plaintiff's petition.

Defendant denies the allegations contained in paragraph 6 of plaintiff's petition including the allegation that said electric storage batteries were commercial commodities and were not specifically designed nor primarily adaptable for use on or in connection with automobile trucks, automobile wagons, motorcycles, and other automobiles.

Defendant denies the allegations contained in paragraphs 7. 8, and 9 of plaintiff's petition.

Defendant admits the allegation contained in paragraph 10 of plaintiff's petition.

Defendant denies the allegations contained in paragraph 11 of plaintiff's petition.

Defendant admits that on October 5, 1926, plaintiff filed with the Commissioner of Internal Revenue a claim for refund of manufacturers' excise taxes collected from plaintiff during the taxable periods beginning January 1, 1925, and ending on December 1, 1925, inclusive, and says that said claim for refund was in the amount of $175,875.19, and that said claim for refund was duly rejected by the Commissioner of Internal Revenue on June 25, 1929. Defendant admits that plaintiff filed with the Commissioner of Internal Revenue an amended claim for refund of manufacturers' excise taxes paid by plaintiff during said taxable periods, and denies that said amended claim for refund was filed on November 3, 1926, but says that said amended claim for refund was filed on October 29, 1926, in the amount of $173,934.45, and that said amended claim for refund was duly rejected by the Commissioner of Internal Revenue on June 21, 1927.

206 Defendant denies that said manufacturers' excise taxes were erroneously and illegally collected.

Defendant denies that there is due plaintiff the sum of $173,934.45 with interest, or any sum whatsoever by reason of payment of manufacturers' excise taxes by plaintiff in the premises.

Defendant further says that under the provisions of section 424 of the Revenue Act of 1928, plaintiff is deprived of the right of refund of manufacturers' excise taxes collected under the provisions of section 900 (3) of the Revenue Act of 1921, and section 600 (3) of the Revenue Act of 1924 in any action instituted subsequent to April 30, 1928, or in any action instituted subsequent to May 29, 1928; that the provisions of section 424 of the Revenue Act of 1928 vest a discretionary power in the Commissioner of Internal Revenue which this court is without jurisdiction to review; that the provisions of section 424 of the Revenue Act of 1928 provide an exclusive remedy within the Treasury Department of the United States.

Wherefore, defendant prays that plaintiff's petition be dismissed and that he be allowed to go hence with his costs.

WILFRED J. MAHON,
United States Attorney.

Copy sent counsel for Pltff. 4-11-30.

W. J. MAHON.

[*Duly sworn to by Wilfred J. Mahon, jurat omitted in printing.*]

207 In United States District Court

Order consolidating case no. 15764 law with cases nos. 15761-2-3-5 law for trial only

Entered May 14, 1931, in no. 15764, by West, Judge

It is ordered that this case be consolidated with cases nos. 15761, 15762, 15763, and 15765 Law for trial only.

In United States District Court

Jury waived; trial in progress; portion of plaintiff's testimony adduced; adjournment to May 15, 1931

Entered May 14, 1931, in no. 15764, by West, Judge

This day came the parties by their attorneys and a jury having been waived, this cause came on to be heard by the court on the pleadings and the evidence, and the court having heard a part of the testimony adduced on behalf of the plaintiff, and the hour for adjournment having arrived, the further trial of this cause was postponed until tomorrow morning at 9:30 o'clock.

208 In United States District Court

Trial in progress; plaintiff's testimony concluded; defendant's testimony concluded; cause taken under advisement by the court

Entered May 15, 1931, in no. 15764, by West, Judge

This day again came the parties by their attorneys and a jury having been waived, this cause came on to be heard by the court on the pleadings and the evidence, and the court having heard all of the testimony adduced on behalf of the parties, took the cause under advisement.

In United States District Court

Waiver of jury

Filed March 9, 1931, in no. 15764

We, the attorneys for the respective parties, hereby waive the trial to the jury of this cause, and agree to submit the same to the court without the intervention of a jury.

TOLLES, HOGSETT & GINN,
Attorney for Plaintiff.
WILFRED J. MAHON,
Attorney for Defendant.

209 In United States District Court

Stipulation of facts

Filed May 14, 1931, in no. 15764

It is hereby stipulated by and between the parties hereto, by their respective attorneys, that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to

the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true.

1. The Willard Storage Battery Company during the times hereinafter mentioned was and now is a corporation organized, existing, and operating under and by virtue of the laws of the State of West Virginia, with its principal place of business located at Cleveland, Ohio.

2. The defendant, C. F. Routzahn, during the times hereinafter mentioned was and now is the duly appointed, qualified, and acting collector of internal revenue for the eighteenth district of Ohio.

3. During the times hereinafter mentioned plaintiff was engaged in the business of manufacturing and selling electric storage batteries.

4. Plaintiff and all the officers thereof have at all times borne true allegiance to the United States of America, and have not, nor have any of them in any way voluntarily aided, abetted, or given encouragement to rebellion against the United States, and plaintiff is a citizen of the United States; the sole owner of the claim hereinafter stated; no action has been had thereon before Congress or any governmental department, except as hereinafter stated, and no part of which has ever been sold or assigned.

5. Plaintiff filed its manufacturer's excise tax returns monthly for the taxable periods December 1924 to November 1925, inclusive, showing the amount of the tax due thereon which was duly assessed on such returns by the Commissioner of Internal Revenue, paid by plaintiff, for the months, in the amounts, and on the dates hereinafter set forth as follows:

210

Period	Year	Month	Year	Page	Line	Amount	Date paid
Dec	1924	Jan	1925	21	2	$14,852.63	1/30/25
Jan	1925	Feb	"	21	8	8,363.97	2/28/25
Feb	"	Mar	"	24	7	11,588.18	3/31/25
Mar	"	Apr	"	23	7	12,923.08	4/30/25
Apr	"	May	"	21	6	6,639.61	5/29/25
May	"	June	"	24	8	6,635.54	6/30/25
June	"	July	"	25	7	7,861.95	7/31/25
July	"	Aug	"	21	8	15,760.86	8/31/25
Aug	"	Sept	"	23	3	18,811.15	9/30/25
Sept	"	Oct	"	24	4	22,705.71	10/31/25
Oct	"	Dec	"	1	1	26,802.53	12/1/25
Nov	"	Dec	"	22	1	21,989.24	12/31/25

6. On October 5, 1926, plaintiff filed its claim for refund no. 21166 of manufacturer's excise tax so paid on the manufacture and sale of electric storage batteries for the taxable periods January 1925 to December 1925, inclusive, in the amount of $175,875.19, which was duly rejected by the Commissioner of Internal Revenue on June 25, 1929.

7. On October 29, 1926, plaintiff filed its claim for refund no. 703 of manufacturer's excise tax so paid on the manufacture and sale of electric storage batteries for the taxable periods December 1924

to November 1925 in the amount of $173,934.45, which was duly rejected by the Commissioner of Internal Revenue on June 21, 1927.

8. Duly certified photostat copies of returns, claims for refund, claims for credit, claims for abatement, waivers, assessments, reports, letters, and other departmental records pertinent to the issues in this case shall be admitted and received in evidence the same as if the originals thereof were properly identified and admitted, subject only to the right of either party to object because of their irrelevancy or immateriality.

WILLARD STORAGE BATTERY COMPANY,
By CHARLES C. NORRIS, JR.,
Attorneys for Plaintiff.
C. F. ROUTZAHN, *Collector.*
By W. J. MAHON,
U.S. Attorney for Defendant.
By JOHN B. OSMUN, *Asst. U.S. Atty.*
E. F. McMAHON, *Special Atty.*

211 In United States District Court

Order of judgment

Entered October 27, 1931, in no. 15764, by West, Judge

This cause coming on to be heard upon the pleadings, the evidence and the argument of counsel, the court having made special findings of fact and conclusions of law in this and four other cases consolidated herewith, which findings of fact and conclusions of law are hereby referred to, on due consideration of the premises, it is

Ordered, decreed, and adjudged that the plaintiff recover from the defendant the sum of $173,934.45, together with interest on the following amounts of taxes paid from the following respective dates of payment at the rate of 6% per annum to a date set by the Commissioner of Internal Revenue of the United States, such date to be not more than thirty days earlier than that of the refund check, to wit:

$14,852.63 from January 30, 1925; $8,363.97 from February 28, 1925; $11,588.18 from March 31, 1925; $11,923.08 from April 30, 1925; $6,639.61 from May 29, 1925; $6,635.54 from June 30, 1925; $7,861.95 from July 31, 1925; $15,760.86 from August 31, 1925; $18,811.15 from September 30, 1925; $22,705.71 from October 31, 1925; $26,802.53 from December 1, 1925; $21,989.24 from December 31, 1925.

It is further ordered that plaintiff recover its costs herein expended, taxed at $----------

Defendant is allowed his exceptions to this judgment and to said findings of fact and conclusions of law.

Approved:

W. J. MAHON, *U.S. Atty.*

212 In United States District Court

Certificate of probable cause

Filed Oct. 27, 1931, in no. 15764

The court having rendered judgment herein in favor of the plaintiff in the amount of $173,934.45, together with interest and costs, said judgment being against C. F. Routzahn, a duly appointed, qualified and acting collector of internal revenue, upon consideration of the evidence, the court finds and hereby certifies that the said judgment is for the recovery of money collected by the said defendant as collector of internal revenue and by him paid into the Treasury of the United States in the performance of his official duties with reference to the collection of income, excise and profits taxes, and that there was probable cause for the act so done by the said defendant collector, by reason whereof the judgment herein was rendered.

S. H. WEST,
United States District Judge.

In United States District Court

Petition

Filed May 31, 1929, in no. 15765

This petition is filed by the plaintiff, Willard Storage Battery Company, a corporation, against the defendant, C. F. Routzahn, collector of internal revenue of the United States for the 18th district of Ohio, to recover the sum of $41,764.57, with interest as hereinafter set forth, upon the cause of action of which the following is a statement:

213 1. Prior to December 1, 1925, and from that time to the present, the plaintiff was, and now is, a corporation organized and existing under the laws of the State of West Virginia, and during that time had and maintained, and now has and maintains, its manufacturing plant and principal place of business at 246 East 131st Street, in the city of Cleveland, in the State of Ohio, and at all times has been, and now is, a resident of the city of Cleveland, in the State of Ohio, in the United States of America.

2. On or about December 1, 1925, and continuously from that date to the present, the said C. F. Routzahn was the duly appointed collector of internal revenue of the United States for the eighteenth district of Ohio, in which is located the city of Cleveland, in the State of Ohio, and at all times herein mentioned was, and now is, a citizen and resident of the northern district of Ohio, eastern division.

3. Prior to December 1, 1925, and from that date continuously to the present time, the plaintiff has been, and now is, engaged in the

manufacture and sale of electric storage batteries at its said plant at no. 246 East 131st Street in the city of Cleveland aforesaid.

4. In each calendar month, during the period beginning on December 1, 1925, and ending on February 28, 1926, the plaintiff made sales of electric storage batteries, all of which sales were made to persons other than manufacturers of automobile trucks, automobile wagons, other automobiles, or motor cycles, and on or before the last day of the calendar month then immediately succeeding each of the said months in which the said sales were made, in accordance with the requirements, and upon the demand of, the defendant made a return in accordance with the provisions of title VI, section 600, of the United States Revenue Act of 1924, of the computation of manufacturer's excise taxes at the rate of two and one half (2½) per centum of the selling prices of the said electric storage batteries upon the sales thereof made by the plaintiff in each immediately preceding calendar month. The forms for the said returns were substantially alike, but were revised from time to time during the
214 said period by the Commissioner of Internal Revenue; and, when filled in and made by the plaintiff, were delivered to the defendant by the plaintiff. The amount of the said manufacturer's excise tax was set forth in each of the said returns in a single sum, and represented the computation of two and one half (2½) per centum upon the selling price of the said electric storage batteries which had been sold by the plaintiff during the then preceding calendar month. A true copy of one of the said returns is hereunto attached, marked "Exhibit A", and made part hereof, and is submitted as a sample of, except as the same was revised as aforesaid, all such returns made by the plaintiff.

5. Heretofore, to wit, on the dates set forth in a statement thereof hereunto attached, marked "Exhibit B", and made part hereof, the plaintiff paid to the defendant, and the defendant collected from the plaintiff, the sums of money set opposite each of the several dates as set forth in exhibit B, which said sums of money amounted in the aggregate to the sum of $41,764.57, and were paid by the plaintiff upon the demand of the defendant as manufacturer's excise taxes upon the selling price of electric storage batteries which were manufactured by the plaintiff, and sold by the plaintiff during the respective calendar months set opposite the said several dates respectively set forth in exhibit B. All of said payments of taxes were made contemporaneously with, and in accordance with, the computation of the said excise taxes as set forth in the returns made by the plaintiff as hereinbefore described.

6. The electric storage batteries upon the selling prices of which the said taxes were paid by the plaintiff, as hereinbefore set forth, were commercial commodities, and were not specifically designed, nor primarily adaptable, only for use on, or in connection with, automobile trucks, automobile wagons, other automobiles, or motorcycles, but were interchangeable for use in stationary and portable engines, and were, and are, extensively used in many industries other than

the automobile truck, automobile wagon, other automobiles and motor cycle industries.

7. The electric storage battery of the kind sold by the plain-
215 tiff during the period between December 1, 1925, and February 28, 1926, and upon the selling prices of which the said taxes were paid by the plaintiff upon the demand of the defendant, as hereinbefore set forth, was in general commercial use for many years before automobiles and automobile trucks and wagons came into existence, and were first used in the United States as a commercial commodity in, or about, the year 1859. In, or about, the year 1894, electric storage batteries were first used on, or in connection with, electric automotive vehicles only, and it was not until in, or about, the year 1911 that they were used on, or in connection with, automobile trucks, other automobiles or motor cycles (other than electric vehicles) and then only for the purpose of lighting. In, or about, the year 1915, electric storage batteries were first used on, or in connection with, automobiles other than electric vehicles, for purposes other than lighting.

8. The electric storage battery of the kind sold by the plaintiff during the aforesaid period, and upon the selling prices of which the said manufacturer's excise taxes were paid by the plaintiff upon the demand of the defendant, as hereinbefore set forth, is used, and for many years has been used, extensively in connection with motor boats, airplanes, tractors, locomotive engines, mine engines, submarines, artillery gun firing, lighting, turret lighting and auxiliary power, signalling devices in railroad systems and in military service, searchlights, telephone service, isolated lighting and power plants, street railways, fire-alarm service, radio, and in a great many other industries and for a great many other purposes too numerous to mention.

9. The electric storage batteries which were sold by the plaintiff during the period beginning on December 1, 1925, and ending on February 28, 1926, as aforesaid, did not constitute parts or accessories for any of the articles enumerated in subdivision (1) or (2) of title VI, section 600, of the United States Revenue Act of 1924, and neither said batteries or the sale thereof by the plaintiff were subject to the manufacturer's excise tax provided therein, and the defendant erroneously and illegally collected from the plaintiff as such manufacturer's excise taxes upon said sales the sum of $41,764.57, as set forth in exhibit B hereunto attached.

216 10. There are attached hereto, marked "Exhibit C" and made part hereof, true and correct copies of the original receipts executed by the defendant for the taxes paid in each calendar month by the plaintiff to, and upon the demand of, the defendant as hereinbefore set forth, and true and correct copies of the checks of the plaintiff which were paid to, and upon the demand of the defendant, and represented the payment of the taxes as set forth in the said receipts, and upon each of which said checks appears the number imposed thereon by the defendant.

11. All of the taxes hereinbefore set forth were paid by the plaintiff upon the demand of the defendant, and were paid by the plaintiff to the defendant under protest, as not being due or payable upon the sales of the electric storage batteries manufactured and sold by the plaintiff, as aforesaid.

12. Heretofore, to wit, October 5, 1926, the plaintiff duly filed with the Commissioner of Internal Revenue of the United States a claim for the refund of the said manufacturer's excise taxes erroneously and illegally collected by the defendant from the plaintiff during the period beginning January 1, 1926, and ending on March 31, 1926, a true copy of which said claim is hereunto attached, marked "Exhibit D" and made part hereof; and thereafter, to wit, on or about November 3, 1926, the plaintiff filed with the Commissioner of Internal Revenue an amended claim for the refund of the said taxes erroneously and illegally collected by the defendant from the plaintiff during the period aforesaid, a true copy of which amended claim of refund is hereunto attached, marked "Exhibit E" and made part hereof. The said Commissioner of Internal Revenue, on or about June 21, 1927, rejected the said claim by letter bearing said date, a true copy of which said letter is hereunto attached, marked "Exhibit F" and made part hereof.

13. There is justly due by the defendant to the plaintiff, and the plaintiff prays that judgment may be entered in favor of the plaintiff and against the defendant in, the sum of $41,764.57, with interest upon each of the payments of the said manufacturer's excise
217 taxes as set forth in exhibit B hereunto attached from the respective dates of such payments and for its costs herein expended.

WILLARD STORAGE BATTERY COMPANY.
CHARLES C. STONE, JR.,
Philadelphia, Pa.
By F. C. FRIEND,
Its Attorneys.

[*Duly sworn to by C. H. Gibney, jurat omitted in printing.*]

PRAECIPE

To the Clerk of the Said Court:

Issue summons for the defendant, returnable according to law, and endorse the same: Action for money judgment only. Amount claimed $41,764.57 with interest at the rate of 6% per annum as provided by law on $16,793.37 from January 28, 1926; on $14,515.68 from February 25, 1926; on $10,455.52 from March 31, 1926, and costs.

CHARLES C. NORRIS, JR.,
Philadelphia, Pa.
F. C. FRIEND,
Counsel for Plaintiff.

218 *Note re exhibit A*

Printer's note:

This exhibit being identical with exhibit A, attached to petition in case no. 15764, it has been omitted to comply with the rule against duplication (see page 8 of this record).

Exhibit B to petition

Month of sales	Date of payment	Amount of tax paid
1925, December	1926, January 28	$16,793.37
1926, January	February 25	14,515.68
February	March 31	10,455.52
		$41,764.57

221 *Exhibit "D" to petition*

(Execute separate form for each tax period)

Treasury Department.
Internal Revenue Service, Form 843—Jan., 1922.
Comptroller General U.S., January 18, 1922.

Collector's notation district.
Account number.
Date received.
Stamp here.
Collector of Internal Revenue.

Claim for

Abatement of tax assessed.
Credit against outstanding assessments.
Refund of taxes illegally collected.
Refund of amounts paid for stamps used in error or excess.

Important

File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

Notice to collector

Collector must indicate in block above the kind of claim, except in income tax cases.

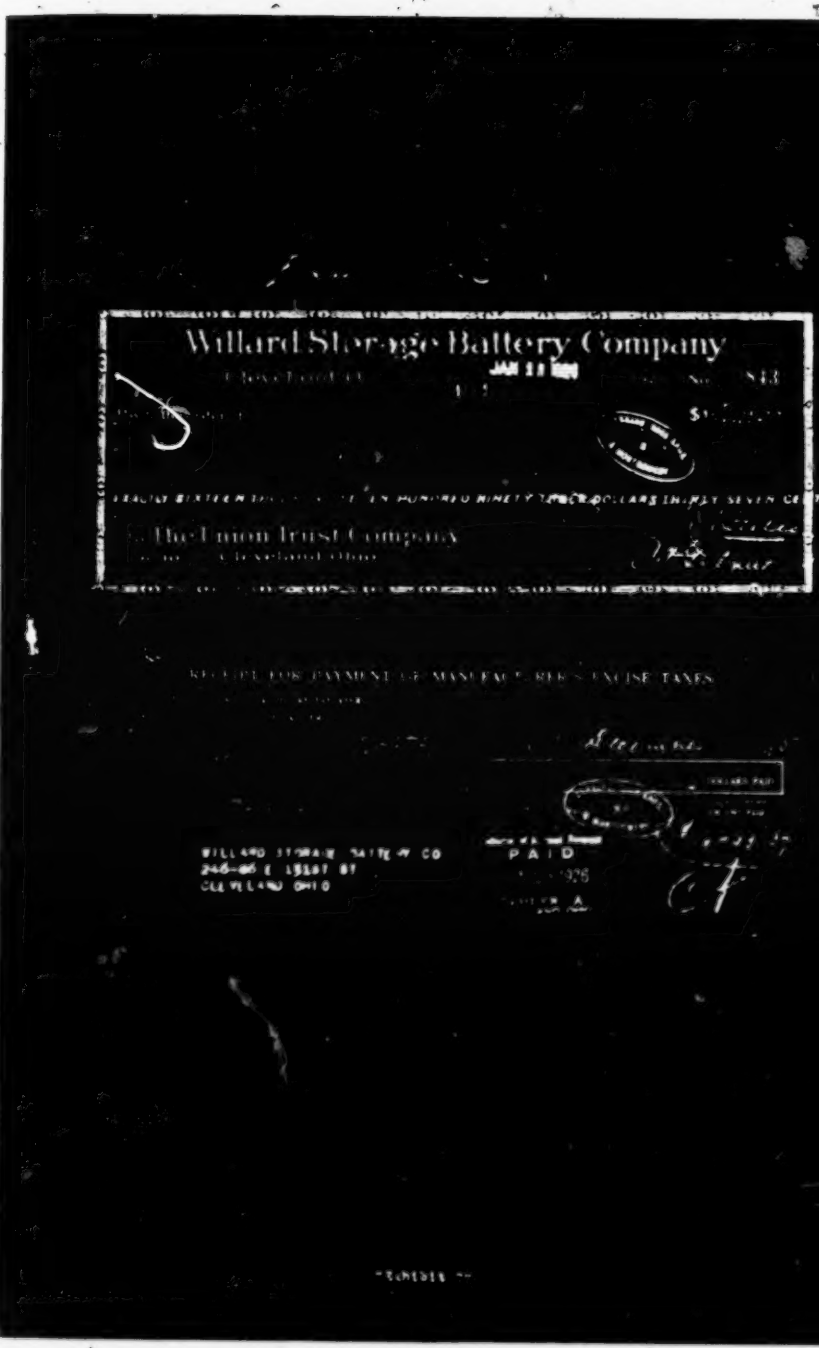
State of Ohio,
County of Cuyahoga, ss:

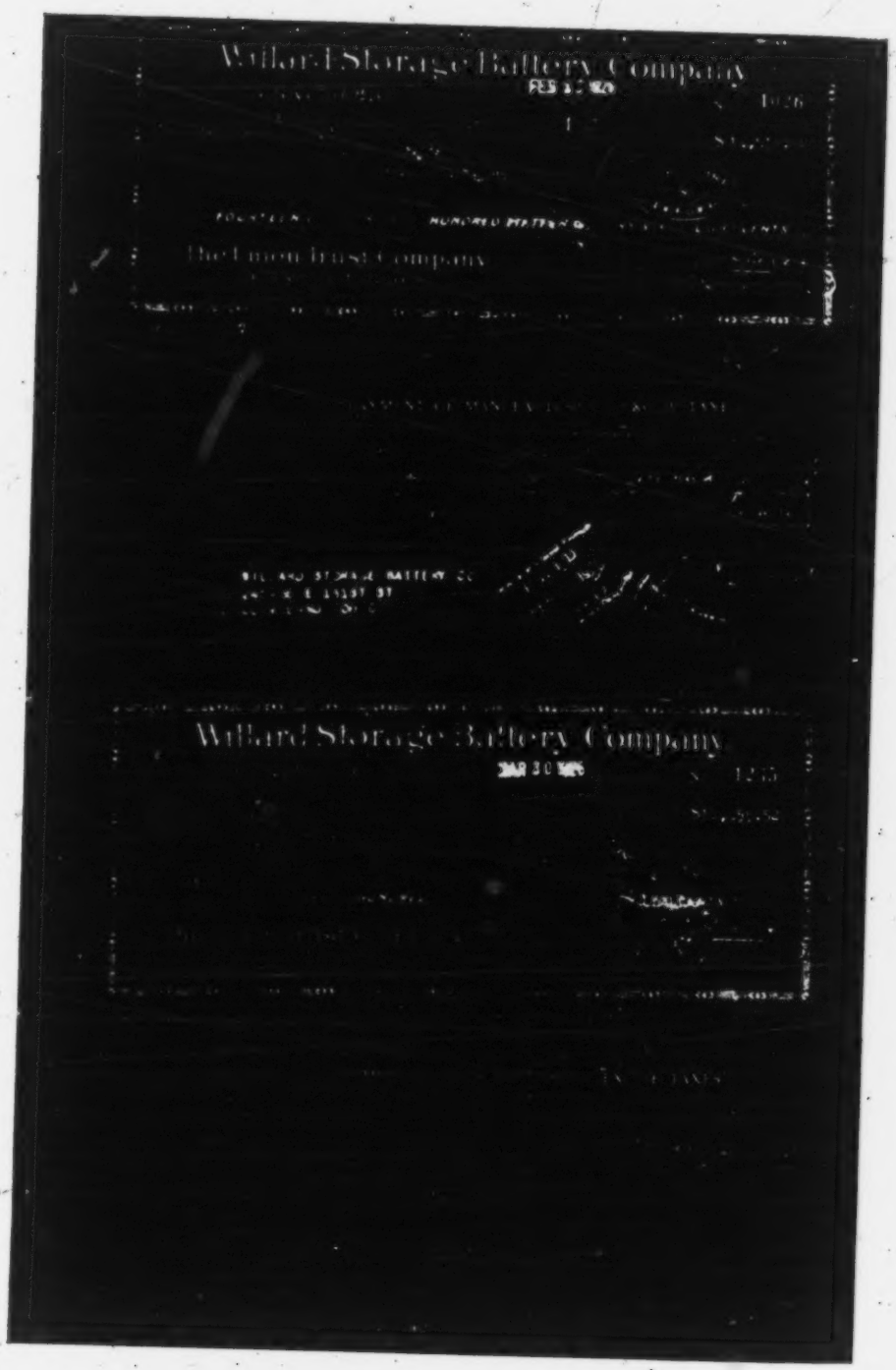
Date received by Administrative Unit 10/5/26.
Stamp here.

Willard Storage Battery Company

Type or Print. (Name of taxpayer or purchaser of stamps).
246 East 131st Street, Cleveland, Ohio.
(Residence—Give street and number as well as city or town and State).
Same (business address).

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:


Willard Storage Battery Company
The Union Trust Company
PAID


Willard Storage Battery Company
The Union Trust Company
Willard Storage Battery Company

222

	Period	Year
	From January 1st, 1926 To February 26th, 1926	
1. Business in which engaged manufacture of electric storage batteries.		
2. Character of assessment of tax manufacturers' excise tax on batteries. (State for or upon what the tax was assessed or the stamps affixed.)		
3. Amount of assessment		$24,971.20
4. Reduction of tax liability requested (income and profits tax)		
5. Amount to be abated		
6. Amount to be refunded (or such greater amount as is legally refundable)		24,971.20
7. Dates of payment (see collector's receipts or indorsements of canceled checks)		
(If statement covers income tax liability, items 8-11, inclusive, must be answered.)		
8. District in which return (if any) was filed Cleveland, Ohio.		
9. District in which unpaid assessment appears		
10. Amount of overpayment claimed as credit		$
11. Unpaid assessment against which credit is asked; period from ---------- to ----------		

Deponent verily believes that this application should be allowed for the following reasons:

Our returns have been filed monthly and the tax paid as required by regulations. As there is only one question involved we are filing this claim for refund by calendar years to cover twelve monthly payments in order to cut the records and correspondence to a minimum.

Our request for refund is based upon the fact that storage batteries were in use before the automobile came into existence, that they are used in connection with all kinds of internal-combustion engines, marine, stationary and portable. While they are used
223 very extensively in automobiles, the same storage batteries are used in motor boats, aeroplanes, farm tractors, road graders, railway locomotive engines, thrashing engines, concrete mixers, water pumps, hoisting machines, electric door bells, radios, laboratory work, and in various other situations when small electric power is required.

In view of the above facts we claim that the collection of the manufacturers' excise tax imposed by Regulations No. 47, under the Revenue Acts of 1918, 1921, and 1924, was a tax illegally collected and as such should be refunded.

(Attach additional sheets if necessary)

(Signed) F. J. STILES.

Sworn to and subscribed before me this 22nd day of September, 1926.

E. L. PETERS,
(Title) *Notary Public.*

(This affidavit may be sworn to before a deputy collector of internal revenue or revenue agent without charge.)

Exhibit "E" to petition

(Execute separate form for each tax period)

Treasury Department.
Internal Revenue Service,
Form 843—Jan., 1922.
Comptroller General U.S.,
January 18, 1922.

Collector's notation district.
Account number.
Date received.
Stamp here.
Collector of internal revenue.

Claim for

Abatement of tax assessed.
Credit against outstanding assessments.
× Refund of taxes illegally collected.
Refund of amounts paid for stamps used in error or excess.

224

Important

File with collector of internal revenue where assessment was made. Not acceptable unless completely filled in.

Notice to collector

Collector must indicate in block above the kind of claim, except in income tax cases.

Date received by Administrative Unit, _____

Stamp here.

State of Ohio,
County of Cuyahoga, ss:

Willard Storage Battery Company

Type or print. (Name of taxpayer or purchaser of stamps.)
246 East 131st Street, Cleveland, Ohio.
(Residence—give street and number as well as city or town and State.)
Same (business address).

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

	Period Year	
	From: January 1st, 1926	
	To: February 26th, 1926	
1. Business in which engaged manufacturer of electric storage batteries.		
2. Character of assessment or tax manufacturers' excise tax on batteries. (State for or upon what the tax was assessed or the stamps affixed.)		
3. Amount of assessment		$41,764.57
4. Reduction of tax liability requested (income and profits tax)		
5. Amount to be abated		
6. Amount to be refunded (or such greater amount as is legally refundable)		41,764.57
7. Dates of payment (see collector's receipts or indorsements of canceled checks)		
(If statement covers income tax liability, items 8–11, inclusive, must be answered.)		
8. District in which return (if any) was filed		
9. District in which unpaid assessment appears		

225 10. Amount of overpayment claimed as credit---------- $----------
11. Unpaid assessment against which credit is asked; period from----------to---------- $----------

Deponent verily believes that this application should be allowed for the following reasons:

This is an amended claim based on the period in which tax was actually paid. Original claim filed October 5th, 1926, was based on period when tax was due.

(Attach additional sheets if necessary.)

(Signed) F. J. STILES.

Sworn to and subscribed before me this 28th day of October 1926.

(Title.)

(This affidavit may be sworn to before a deputy collector of internal revenue or revenue agent without charge.)

Exhibit "F" to petition

TREASURY DEPARTMENT.
Office of Commissioner of Internal Revenue.
Washington.

Address reply to Commissioner of Internal Revenue and refer to MT:M:WED C1-S-704.

WILLARD STORAGE BATTERY COMPANY,
246 East 131st Street, Cleveland, Ohio.

GENTLEMEN: Reference is made to your claim for refund of $41,764.57 paid as manufacturer's excise tax on automobile parts and accessories.

226 You were requested to advise within 30 days whether you intended to comply with Treasury Decision 4015 in the prosecution of your claim.

This office is in receipt of your letter dated June 10, 1927, from which it appears that you do not intend to prosecute the matter further along the lines suggested. Your claim is accordingly hereby rejected for lack of evidence.

Respectfully,

C. D. NASH,
Acting Commissioner.

EM

In United States District Court

Motion to dismiss

Filed July 8, 1929, in no. 15765

Now comes Wilfred J. Mahon, United States attorney for the northern district of Ohio, on behalf of the defendant herein, and by leave of court first obtained, moves to dismiss the above entitled cause upon the grounds and reasons therefor as follows:

1. Because the provisions of section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of refund of manufacturer's

excise taxes collected under the provisions of section 900 (3) of the Revenue Act of 1921 and section 600 (3) of the Revenue Act of 1924 in an action instituted subsequent to April 30, 1928.

2. Because the provisions of section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of instituting and maintaining
227 and action, subsequent to May 29, 1928, effective date of the act, for the recovery of manufacturer's excise tax paid under the provisions of section 900 (3) of the Revenue Act of 1921 and section 600 (3) of the Revenue Act of 1924.

3. Because this court is without jurisdiction to review the discretionary power vested in the Commissioner of Internal Revenue by the provisions of section 424 of the Revenue Act of 1928.

4. Because the provisions of section 424 of the Revenue Act of 1928 provide an exclusive remedy.

W. J. MAHON,
United States Attorney.

The plaintiff will take notice that the defendant has filed a motion to dismiss in the above entitled case; that said motion will be on for hearing at such time as the court shall designate.

W. J. MAHON.

Received service of the above motion and notice this 8 day of June 1929.

CHARLES C. NORRIS, JR., and F. C. FRIEND,
Atty's for Plff.

In United States District Court

Answer

Filed April 12, 1930, in no. 15765

Now comes Wilfred J. Mahon, United States attorney for the northern district of Ohio, on behalf of the defendant herein, by leave of court first obtained, and for answer to plaintiff's petition admits
228 the corporate capacity of the plaintiff herein; admits that defendant is duly appointed, qualified and acting collector of internal revenue of the United States for the eighteenth district of Ohio, and that the city of Cleveland is located in said district.

Defendant admits all the allegations contained in numbered paragraphs 1, 2 and 3 of plaintiff's petition.

Defendant admits all the allegations contained in paragraph 4 of plaintiff's petition including the allegation that all of said sales of electric storage batteries upon which tax was paid, were made to persons other than manufacturers of automobile trucks, automobile wagons, motorcycles and other automobiles.

Defendant admits the allegations contained in paragraph 5 of plaintiff's petition.

Defendant denies the allegations contained in paragraph 6 of plaintiff's petition including the allegation that said electric storage

batteries were commercial commodities and were not specifically designed nor primarily adaptable for use on or in connection with automobile trucks, automobile wagons, motorcycles, and other automobiles.

Defendant denies the allegations contained in paragraphs 7, 8, and 9 of plaintiff's petition.

Defendant admits the allegations contained in paragraph 10 of plaintiff's petition.

Defendant denies the allegations contained in paragraph 11 of plaintiff's petition.

Defendant admits that on October 5, 1926, plaintiff filed with the Commissioner of Internal Revenue a claim for refund of manufacturers excise taxes collected from plaintiff during the taxable peroids January and February 1926, inclusive, and denies that said claim for refund included taxes paid for the period of March 1926. Defendant says that said claim for refund was in the sum of $24,971.20, and that said claim for refund was duly rejected by the Commissioner of Internal Revenue on June 25, 1929. Defendant admits that plaintiff filed with the Commissioner of Internal Revenue an amended claim for refund of manufacturers excise taxes paid by plaintiff during the taxable periods of January and February 1926, inclusive, and denies that said amended claim for refund included the tax-
229 able period of March 1926; that said amended claim for refund was in the sum of $41,764.57 and that said amended claim for refund was duly rejected by the Commissioner of Internal Revenue on June 21, 1927. Defendant denies that said manufacturers excise taxes were erroneously and illegally collected.

Defendant denies that there is due plaintiff the sum of $41,764.57 with interest, or any sum whatsoever by reason of payment of manufacturers excise taxes by plaintiff in the premises.

Defendant further says that under the provisions of section 424 of the Revenue Act of 1928, plaintiff is deprived of the right of refund of manufacturers excise taxes collected under the provisions of section 900 (3) of the Revenue Act of 1921, and section 600 (3) of the Revenue Act of 1924, in any action instituted subsequent to April 30, 1928, or in any action instituted subsequent to May 29, 1928; that the provisions of section 424 of the Revenue Act of 1928, vest a discretionary power in the Commissioner of Internal Revenue which this court is without jurisdiction to review; that the provisions of section 424 of the Revenue Act of 1928 provide an exclusive remedy within the Treasury Department of the United States.

Wherefore, defendant prays that plaintiff's petition be dismissed, and that he be allowed to go hence with his costs.

WILFORD J. MAHON,
United States Attorney.

Copy sent to counsel for pltff. 4–11–30.

W. J. MAHON.

[*Duly sworn to by Wilfred J. Mahon; jurat omitted in printing.*]

230 In United States District Court

Order consolidating case nos. 15765 law with cases nos. 15761-2-3-4 law for trial only

Entered May 14, 1931, in no. 15765, by West, Judge

It is ordered that this case be consolidated with cases nos. 15761, 15762, 15763, and 15764 law for trial only.

In United States District Court

Stipulation of facts

Filed May 14, 1931, in no. 15765

It is hereby stipulated by and between the parties hereto, by their respective attorneys, that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true.

1. The Willard Storage Battery Company during the times hereinafter mentioned was and now is a corporation organized, existing, and operating under and by virtue of the laws of the State of West Virginia with its principal place of business located at Cleveland, Ohio.

2. The defendant, C. F. Routzahn, during the times hereinafter mentioned was and now is the duly appointed, qualified, and acting collector of internal revenue for the eighteenth district of Ohio.

231 3. During the times hereinafter mentioned plaintiff was engaged in the business of manufacturing and selling electric storage batteries.

4. Plaintiff and all the officers thereof have at all times borne true allegiance to the United States of America and have not nor have any of them in any way voluntarily aided, abetted, or given encouragement to rebellion against the United States, and plaintiff is a citizen of the United States, the sole owner of the claim hereinafter stated, no action has been had thereon before Congress or any governmental department, except as hereinafter stated, and no part of which has ever been sold or assigned.

5. Plaintiff filed its manufacturer's excise tax returns monthly for the taxable periods December 1925 to February 1926, inclusive, showing the amount of tax due thereon, which was duly assessed on such returns by the Commissioner of Internal Revenue, paid by plaintiff, for the months, in the amounts, and on the dates hereinafter set forth as follows:

Period	Year	Month	Year	Page	Line	Amount	Date paid
Dec	1925	Jan	1926	18	1	$16,793.37	1/29/26
Jan	1926	Feb	"	15	7	14,515.68	2/26/26
Feb	"	Apr	"	0	3	10,455.52	4/1/26

6. On October 5, 1926, plaintiff filed its claim for refund, no. 21165, of manufacturer's excise tax so paid on the manufacture and sale of electric storage batteries for the taxable periods January and February 1926, in the amount of $24,971.20, which was duly rejected by the Commissioner of Internal Revenue on June 25, 1929.

7. On October 29, 1926, plaintiff filed its amended claim for refund, no. 704, of manufacturer's excise tax so paid on the manufacture and sale of electric storage batteries for the taxable periods December 1925 to February 1926, inclusive, in the amount of $41,764.57, which was duly rejected by the Commissioner of Internal Revenue on June 21, 1927.

8. Duly certified photostat copies of returns, claims for refund, claims for credit, claims for abatement, waivers, assessments, reports, letters, and other departmental records pertinent to the issues in this case shall be admitted and received in evidence the same as if the originals thereof were properly identified and admitted, subject only to the right of either party to object because of their irrelevancy, or immateriality.

232

WILLARD STORAGE BATTERY COMPANY,
By CHARLES C. NORRIS, Jr.,
Attorneys for Plaintiff.
C. F. ROUTZAHN, *Collector.*
By W. J. MAHON,
U.S. Attorney for Defendant.
By JOHN B. OSMUN, *Asst. U.S. Atty.*
E. F. McMAHON,
Special Atty.

In United States District Court

Jury waived; trial in progress; portion of plaintiff's testimony adduced; adjournment to May 15, 1931

Entered May 14, 1931, in no. 15765, by West, Judge

This day came the parties by their attorney, and a jury having been waived this cause came on to be heard by the court on the pleadings and the evidence, and the court having heard a part of the testimony adduced on behalf of the plaintiff, and the hour for adjournment having arrived, the further trial of this cause was postponed until tomorrow morning at 9:30 o'clock.

233 In United States District Court

Jury waived; trial in progress; plaintiff's testimony concluded; defendant's testimony concluded; cause taken under advisement by the court

Entered May 15, 1931, in no. 15765, by West, Judge

This day again came the parties by their attorneys and a jury having been waived, this cause came on to be heard by the court on the pleadings and the evidence, and the court having heard all of the testimony adduced on behalf of the parties, took the cause under advisement.

In United States District Court

Waiver of jury

Filed March 9, 1931, in no. 15765

We, the attorneys for the respective parties, hereby waive the trial to the jury of this cause, and agree to submit the same to the court without the intervention of a jury.

TOLLES, HOGSETT & GINN,
Attorney for Plaintiff.
WILFRED J. MAHON,
Attorney for Defendant.

234 In United States District Court

Order of judgment

Entered October 27, 1931, in no. 15765, by West, Judge

This cause coming on to be heard upon the pleadings, the evidence and the argument of counsel, the court having made special findings of fact and conclusions of law in this and four other cases consolidated herewith, which findings of fact and conclusions of law are hereby referred to on due consideration of the premises, it is

Ordered, decreed, and adjudged that the plaintiff recover from the defendant the sum of $41,764.57, together with interest on the following amounts of taxs paid from the following respective dates of payment at the rate of 6% per annum to a date set by the Commissioner of Internal Revenue of the United States, such date to be not more than thirty days earlier than that of the refund check, to wit:

$16,793.37 from January 29, 1926.
14,515.68 from February 26, 1926.
10,455.52 from April 1, 1926.

It is further ordered that plaintiff recover its costs herein expended, taxed at $_____.

Defendant is allowed his exceptions to this judgment and to said findings of fact and conclusions of law.

Approved:

W. J. MAHON, *U.S. Atty.*

235 In United States District Court

Certificate of probable cause

Filed Oct. 27, 1931, in no. 15765

The court having rendered judgment herein in favor of the plaintiff in the amount of $11,764.57, together with interest and costs, said judgment being against C. F. Routzahn, a duly appointed, qualified, and acting collector of internal revenue, upon consideration of the evidence, the court finds and hereby certifies that the said judgment is for the recovery of money collected by the said defendant as collector of internal revenue and by him paid into the Treasury of the United States in the performance of his official duties with reference to the collection of income, excise, and profits taxes, and that there was probable cause for the act so done by the said defendant collector, by reason whereof the judgment herein was rendered.

S. H. WEST,
United States District Judge.

In United States District Court

Order consolidating cases for appeal

Entered November 7, 1931, in nos. 15761, 15762, 15763, 15764, 15765 by West, Judge

Upon application of the United States attorney, it is hereby ordered, adjudged, and decreed that the above-entitled actions be consolidated for and on appeal under one cover.

Approved:

JOHN B. OSMUN,
Asst. United States Attorney.

236 In United States District Court

Petition for appeal

Filed Nov. 18, 1931, in nos. 15761, 15762, 15763, 15764, 15765

Now comes the defendant and says that on the 27th day of October 1931 this court entered judgments herein in favor of the plaintiff and against the defendant in which judgments and proceedings of this

cause, certain errors were committed to the prejudice of this defendant, all of which will in detail appear from the assignments of error which is filed with this petition and that by reason thereof, this defendant does hereby appeal from said judgments to the United States Circuit Court of Appeals for the Sixth Circuit.

Wherefore, this defendant prays that this appeal may be allowed and that a transcript of the record, proceedings, and papers in this case, duly authenticated, may be sent to the said Circuit Court of Appeals.

W. J. MAHON,
By JOHN B. OSMUN,
United States Attorney, Attorney for the Defendant.

Copy served on Pltff.

J. B. O.

237 In United States District Court

Assignment of errors.

Filed Nov. 18, 1931, in nos. 15761, 15762, 15763, 15764, 15765

Now comes the defendant, C. F. Routzahn, and having prayed for an appeal to the United States Circuit Court of Appeals for the Sixth Circuit, from the judgment of the District Court entered herein on the 27th day of October 1931, files with the accompanying petition for appeal, the following assignment of errors:

1. The court erred in overruling defendant's motion to dismiss plaintiff's petitions.

2. The court erred in overruling defendant's motion for judgment for the following reasons:

A. The provisions of section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of refund of manufacturer's excise tax paid or collected under the provisions of sections 900 (3) of the Revenue Act of 1921, and 600 (3) of the Revenue Act of 1924 in actions instituted subsequent to April 30, 1928.

B. The provisions of section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of instituting and maintaining these actions for the recovery of manufacturer's excise tax paid or collected under the provisions of sections 900 (3) of the Revenue Act of 1921, and 600 (3) of the Revenue Act of 1924 subsequent to April 30, 1928.

C. The provisions of section 424 of the Revenue Act of 1928 are a limitation on the provisions of section 3226 of the Revised Statutes as amended by the provisions of section 1113A of the Revenue Act of 1926.

D. The provisions of section 424 of the Revenue Act of 1928 are a limitation on the provisions of section 563 of the Revised Statutes and this court is without jurisdiction to hear and determine such actions.

E. Plaintiff has failed to sustain by the evidence adduced at the trial of these cases, the burden of proof placed on it in these actions.

F. The evidence adduced at the trial of these cases conclusively shows that the batteries manufactured and sold by plaintiff
238 during the taxable periods involved, upon which the tax in question was paid, were manufactured and sold as parts or accessories of automobile trucks, automobile wagons, and other automobiles.

G. The evidence adduced at the trial of these cases conclusively shows that the batteries manufactured and sold by plaintiff during the taxable periods involved, upon which the tax in question was imposed, were primarily adapted for use in automobile trucks, automobile wagons, and other automobiles."

H. All of the tax in question in these actions, was voluntarily paid to the collector of internal revenue for the eighteenth collection district of Ohio, without protest or duress.

3. The court erred in entering judgment against the defendant and in favor of plaintiff in that the facts found do not support the judgment.

4. The court erred in entering judgment against the defendant and in favor of the plaintiff in that the judgment is not supported by the evidence.

5. The court erred in entering judgment against the defendant and in favor of the plaintiff in that such judgment is contrary to the provisions of section 424 (a) (1) of the Revenue Act of 1928.

6. The court erred in finding and concluding as a conclusion of law number one:

"The articles upon the sale of which the taxes in the foregoing actions no. 15761, 15762, 15763, 15764, and 15765, were collected are not parts or accessories for any of the articles mentioned in subdivisions (1) and (2) of sections 900 of the Revenue Act of 1921 and 600 of the Revenue Act of 1924 and the said taxes were illegally assessed and collected"

in that there is no evidence to support such finding and such conclusion renders the provisions of sections 900 of the Revenue Act of 1921 and 600 of the Revenue Act of 1924 and 424 of the Revenue Act of 1928, ineffective and unenforcible, is contrary to the express provisions of such sections and such conclusion is not supported by the facts found by the court nor the evidence adduced at the trial of this case.

239 7. The court erred in concluding in its conclusion of law number two:

"In case no. 15761 the plaintiff is entitled to judgment for the amount of taxes illegally collected in the sum of $89,195.36, together with interest upon the amounts of taxes paid from the date of their respective payments at the rate of 6% per annum to a date set by the Commissioner of Internal Revenue of the United States, such date to be not more than thirty days earlier than that of the refund check"

in that there is no evidence to support such finding and such con-

clusion renders the provisions of sections 900 of the Revenue Act of 1921 and 600 of the Revenue Act of 1924 and 424 of the Revenue Act of 1928, ineffective and unenforcible, is contrary to the express provisions of such sections and such conclusion is not supported by the facts found by the court nor the evidence adduced at the trial of this case.

8. The court erred in concluding in its conclusion of law number three:

"In case no. 15762 the plaintiff is entitled to judgment for the amount of taxes illegally collected in the sum of $249,275.32, together with interest upon the amounts of taxes paid from the date of their respective payments at the rate of 6% per annum to a date set by the Commissioner of Internal Revenue of the United States, such date to be not more than thirty days earlier than that of the refund check"

in that there is no evidence to support such finding and such conclusion renders the provisions of section 900 of the Revenue Act of 1921 and 600 of the Revenue Act of 1924 and 424 of the Revenue Act of 1928, ineffective and unenforcible, is contrary to the express provisions of such sections and such conclusion is not supported by the facts found by the court nor the evidence adduced at the trial of this case.

9. The court erred in concluding in its conclusion of law number four:

"In case no. 15763 the plaintiff is entitled to judgment for
240 the amount of taxes illegally collected in the sum of $89,-853.88, together with interest upon the amounts of taxes paid from the date of their respective payments at the rate of 6% per annum to a date set by the Commissioner of Internal Revenue of the United States, such date to be not more than thirty days earlier than that of the refund check"

in that there is no evidence to support such finding and such conclusion renders the provisions of section 900 of the Revenue Act of 1921 and 600 of the Revenue Act of 1924 and 424 of the Revenue Act of 1928, ineffective and unenforcible, is contrary to the express provisions of such sections and such conclusion is not supported by the facts found by the court nor the evidence adduced at the trial of this case.

10. The court erred in concluding in its conclusion of law number five:

"In case no. 15764 the plaintiff is entitled to judgment for the amount of taxes illegally collected in the sum of $173,934.45, together with interest upon the amounts of taxes paid from the date of their respective payments at the rate of 6% per annum to a date set by the Commissioner of Internal Revenue of the United States, such date to be not more than thirty days earlier than that of the refund check"

in that there is no evidence to support such finding and such conclusion renders the provisions of section 900 of the Revenue Act

of 1921 and 600 of the Revenue Act of 1924 and 424 of the Revenue Act of 1928, ineffective and unenforcible, is contrary to the express provisions of such sections and such conclusion is not supported by the facts found by the court nor the evidence adduced at the trial of this case.

11. The court erred in concluding in its conclusion of law number six:

"In case no. 15765 the plaintiff is entitled to judgment for the amount of taxes illegally collected in the sum of $41,764.57, together with interest upon the amounts of taxes paid from the
241 date of their respective payments at the rate of 6% per annum to a date set by the Commissioner of Internal Revenue of the United States, such date to be not more than thirty days earlier than that of the refund check"

in that there is no evidence to support such finding and such conclusion renders the provisions of section 900 of the Revenue Act of 1921 and 600 of the Revenue Act of 1924 and 424 of the Revenue Act of 1928, ineffective and unenforcible, is contrary to the express provisions of such sections and such conclusion is not supported by the facts found by the court nor the evidence adduced at the trial of this case.

12. The court erred in refusing to find as a finding of fact as requested by the defendant, number one:

"The use to which an electric storage battery is to be placed determines its design",

in that said finding of fact is supported by the evidence.

13. The court erred in refusing to find as a finding of fact as requested by the defendant, number two:

"Plaintiff has failed to show the specific design of electric storage battery required for each of the uses to which its electric storage batteries were used or placed during each of years 1895 to 1926, inclusive",

in that said finding of fact is supported by the evidence.

14. The court erred in refusing to find as a finding of fact as requested by the defendant, number three:

"Plaintiff has failed to show the specific duty requirements of each of the uses to which its electric storage batteries were used or placed during each of the years 1895 to 1926, inclusive",

in that said finding of fact is supported by the evidence.

15. The court erred in refusing to find as a finding of fact as requested by the defendant, number four:

"Plaintiff has failed to show the specific design of electric storage battery required for each of the uses, other than on or in connection with automobile trucks, automobile wagons, other auto-
242 mobiles, etc., to which its batteries were placed or used during the taxable periods September 1922 to February 1926, inclusive"

in that said finding of fact is supported by the evidence.

16. The court erred in refusing to find as a finding of fact, as requested by the defendant, number five:

"Plaintiff has failed to show the specific duty requirements of each of the uses, other than on or in connection with automobile trucks, automobile wagons, other automobiles, etc., to which its electric storage batteries were used or placed during the taxable periods September 1922 to February 1926, inclusive",

in that said finding of fact is supported by the evidence.

17. The court erred in refusing to find as a finding of fact as requested by the defendant, number six:

"Plaintiff has failed to show the specific design of electric storage battery required for each of the uses, other than on or in connection with automobile trucks, other automobiles, etc., to which its batteries were placed or used during each of the years 1895 to 1926, inclusive, were of the same design required for use on or in connection with automobile trucks, other automobiles, etc., during each of the years 1908 to 1926, inclusive",

in that said finding of fact is supported by the evidence.

18. The court erred in refusing to find as a finding of fact as requested by the defendant, number seven:

"Plaintiff has failed to show the specific duty requirements of each of the uses, other than on or in connection with automobile trucks, other automobiles, etc., to which its electric storage batteries were placed or used during each of the years 1895 to 1926, inclusive, were the same as the duty requirements of the use on or in connection with automobile trucks, other automobiles, etc., during each of the years 1908 to 1926, inclusive",

in that said finding of fact is supported by the evidence.

19. The court erred in refusing to find as a finding of fact as requested by the defendant, number eight:

243 "Plaintiff has failed to show the specific number of each size and type of electric storage battery manufactured and sold by it for each use to which its batteries were placed or used, other than on or in connection with automobile trucks, other automobiles, etc., during the taxable periods September 1922 to February 1926, inclusive",

in that said finding of fact is supported by the evidence.

20. The court erred in refusing to find as a finding of fact as requested by the defendant, number nine:

"Plaintiff has failed to show the specific number of each size and type of electric storage battery manufactured and sold by it and upon the sale of which the taxes in question were imposed, which it manufactured and sold for other uses than on or in connection with automobile trucks, other automobiles, etc., during the taxable periods September 1922 to February 1926, inclusive",

in that said finding of fact is supported by the evidence.

21. The court erred in refusing to find as a finding of fact as requested by the defendant, number ten:

"Plaintiff has failed to show that each specific size and type of its electric storage batteries, upon the manufacture and sale of which the tax was paid for the taxable periods in question, was not primarily designed for use on or in connection with automobile trucks, automobile wagons, other automobiles, and motorcycles",
in that said finding of fact is supported by the evidence.

22. The court erred in refusing to find as a finding of fact as requested by the defendant, number eleven:

"Plaintiff has failed to show that each specific size and type of its electric storage batteries, upon the manufacture and sale of which the tax was paid for the taxable periods in question, was not primarily adapted for use on or in connection with automobile trucks, automobile wagons, other automobiles, and motorcycles",
in that said finding of fact is supported by the evidence.

23. The court erred in refusing to find as a finding of fact as requested by the defendant, number twelve:

244 "Plaintiff advertised to the public during the taxable periods in question that numerous designated manufacturers of automobiles and automobile trucks were then using its batteries as original equipment in automobiles and automobile trucks manufactured and sold by such manufacturers",
in that said finding of fact is supported by the evidence.

24. The court erred in refusing to find as a finding of fact as requested by the defendant, number thirteen:

"Plaintiff advertised to its trade, other than manufacturers of automobile trucks and other automobiles, in bulletins and catalogues put out by it during each year 1922 to 1926, that each of the specific sizes and types of its electric storage batteries, upon the manufacture and sale of which the tax in question was paid for the taxable periods September 1922 to February 1926, inclusive, was adapted for use as a replacement battery in some make of practically all makes of automobiles and automobile trucks then manufactured and in use",
in that said finding of fact is supported by the evidence.

25. The court erred in refusing to find as a finding of fact as requested by the defendant, number fourteen:

"The chief use or principal use to which batteries of the specific sizes and types, upon the manufacture and sale of which the tax in question was paid for the taxable periods September 1922 to February 1926, inclusive, was in automobile trucks and other automobiles",
in that said finding of fact is supported by the evidence.

26. The court erred in refusing to find as a finding of fact as requested by the defendant, number fifteen:

"The tax in question, which was paid for the taxable periods September 1922 to February 1926, inclusive, by plaintiff to the defendant, was passed on or collected by plaintiff, directly, or indirectly from its customers and the ultimate consumers",
in that said finding of fact is supported by the evidence.

27. The court erred in refusing to find as a finding of fact as requested by the defendant, number sixteen:

245 "All of the electric storage batteries manufactured and sold by plaintiff, upon which the tax in question was paid for the taxable periods involved, were primarily adapted for use in some make of automobile trucks, automobile wagon, or other automobiles",

in that said finding of fact is supported by the evidence.

28. The court erred in refusing to find as a finding of fact as requested by the defendant, number seventeen:

"Plaintiff advertised to its trade, other than manufacturers of automobile trucks and automobiles, in bulletins put out by it during the taxable periods involved, that the prices quoted included Federal excise tax",

in that said finding of fact is supported by the evidence.

29. The court erred in refusing to find as a conclusion of law as requested by the defendant, number one:

"That the electric storage batteries manufactured and sold by plaintiff during the taxable periods September 1922 to February 1926, inclusive, upon the sale of which the tax in question was imposed, were manufactured and sold as parts or accessories for automobile trucks, automobile wagons, and other automobiles within the meaning of the provisions of sections 900 of the Revenue Act of 1921 and 600 of the Revenue Act of 1924",

in that such conclusion of law is supported by the evidence.

30. The court erred in refusing to find as a conclusion of law as requested by the defendant, number two:

"That the defendant is entitled to judgment against plaintiff and in favor of defendant, dismissing plaintiff's petitions at plaintiff's costs",

in that such conclusion of law is supported by the evidence.

31. The court erred in refusing to find as a conclusion of law as requested by the defendant, number three:

246 "That plaintiff is not entitled to judgment against de-defendant and in favor of plaintiff in any amount",

in that such conclusion of law is supported by the evidence.

Wherefore, defendant prays that said judgment be reversed and for such other and further relief as may be deemed proper in the premises.

W. J. MAHON,
United States Attorney.

In United States District Court

Order allowing appeal

Entered Nov. 18, 1931, in nos. 15761, 15762, 15763, 15764, 15765, by West, Judge

This day came the defendant, by Wilfred J. Mahon, United States attorney for the northern district of Ohio, and filed herein and presented to the court his petition praying for the allowance of an

appeal intended to be urged by him; praying also that a transcript of record and proceedings and papers upon which judgments herein were rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Circuit and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the court does allow the appeal.

Copy served on pltff.

J. B. O.

247 [Citation in usual form showing service on Hepburn and Norris et al., filed Nov. 20, 1931, omitted in printing.]

249 In United States District Court

Order of court for withdrawal of exhibits for transmission to U.S. Circuit Court of Appeals

Entered December 14, 1931, nos. 15761, 15762, 15763, 15764, 15765, by West, Judge

Upon application of the defendant to transmit the exhibits offered in the above-entitled actions, to the Circuit Court of Appeals as physical exhibits and not to be printed in full in the transcript of record, it is considered by the court to be necessary and proper because of the great volume thereof, that the plaintiff's and defendant's exhibits offered in the trial of the above-entitled actions should be transmitted as original papers and exhibits to the Circuit Court of Appeals.

It is therefore ordered, adjudged, and decreed that all of plaintiff's and defendant's exhibits offered in the trial of the above-entitled actions be withdrawn from the clerk of this court and transmitted by the clerk to the Sixth Circuit Court of Appeals to be inspected in that court upon review without being printed in the transcript of record. Rule 15, paragraph 6, Circuit Court of Appeals.

Approved:

JOHN B. OSMUN,
Asst. United States Attorney.

250 In United States District Court

Stipulation as to record

Filed Nov. 18, 1931, in nos. 15761, 15762, 15763, 15764, 15765

In accordance with section 6 of rule 44 of the general rules of this court, it is hereby agreed that the record as presented to the clerk by the printer may be certified by the clerk as required by law and the rules of the appellate court, as a true, full, and complete copy of the

original pleadings, papers, and orders used on the trial of this cause, as set forth in the precipe for transcript, without further comparison by the clerk.

HEPBURN and NORRIS,
F. C. FRIEND,
TOLLES, HOGSETT & GINN,
Attorney for Plaintiff.
W. J. MAHON and JOHN B. OSMUN,
Attorneys for Defendant.

In United States District Court

Order extending time for filing transcript of record in above-consolidated causes in United States Circuit Court of Appeals

Entered December 16, 1931, in nos. 15761, 15762, 15763, 15764, 15765, by West, Judge

Upon application made and for good cause shown, it is ordered that the time for filing the transcript of record in the above-consolidated causes in the United States Circuit Court of Appeals for the Sixth Circuit be extended from December 18, 1931, to January 25, 1932.

December 1931.

251 In United States District Court

Order extending time for filing transcript of record in above cases in United States Circuit Court of Appeals

Entered January 21, 1932, in nos. 15761, 15762, 15763, 15764, 15765, by West, Judge

Upon application made and for good cause shown, it is ordered that the time for filing the transcript of record in the above cases in the United States Circuit Court of Appeals for the Sixth Circuit be extended from January 25, 1932, to February 25, 1932.

January, 1932.

In United States District Court

Order extending time for filing transcript of record in United States Circuit Court of Appeals

Entered February 23, 1932, in nos. 15761, 15762, 15763, 15764, 15765, by West, Judge

Upon application made and for good cause shown, it is ordered that the time for filing the transcript of record in the above consolidated causes in the United States Circuit Court of Appeals for the Sixth Circuit be extended from February 25, 1932, to March 30, 1932,

252 In United States District Court

Order extending time for filing transcript of record in United States Circuit Court of Appeals

Entered March 23, 1932, in nos. 15761, 15762, 15763, 15764, 15765, by West, Judge

Upon application made and for good cause shown, it is ordered that the time for filing the transcript of record in the above cases, consolidated for appeal, in the United States Circuit Court of Appeals for the Sixth Circuit be extended from March 30, 1932, to April 30, 1932.

March 23, 1932.

In United States District Court

Praecipe for transcript

Filed Nov. 18, 1931, in nos. 15761, 15762, 15763, 15764, 15765

To the Clerk:

Please prepare transcript of record for the Circuit Court of Appeals in the above-entitled cause, and include therein the following papers and orders in case 15761:

1. Petition filed May 31, 1929.
2. Deft.'s motion to dismiss, filed July 8, 1929.
3. Order overruling Deft.'s motion to dismiss, filed Dec. 16, 1929.
4. Deft.'s exception to order overruling motion to dismiss.
5. Deft.'s answer, filed Apr. 12, 1930.

5a. Journal entries of May 14 and 15, 1931.

6. Stipulation of facts, filed May 14, 1931.

253 7. Waiver of jury, filed Mar. 9, 1931.

7a. Order consolidating cases for trial filed May 14, 1931.

8. Plaintiff's request for findings of fact and conclusions of law, filed May 15, 1931.
9. Deft.'s request for findings of fact and conclusions of law, filed May 15, 1931.
10. Stipulation in re offer of pltf.'s exhibits.
11. Order overruling deft.'s motion for judgment.
12. Deft.'s exception to court's ruling denying deft.'s motion for judgment.
13. Findings of fact and conclusions of law.

13a. Order denying deft.'s request for findings of fact and conclusions of law.

14. Deft.'s exceptions to court's ruling denying defendant's request for findings of fact and conclusions of law.
16. Deft.'s exceptions to findings of fact and conclusions of law.
18. Opinion of court filed Sept. 15, 1931.
19. Order of judgment filed Oct. 27, 1931.

20. Certificate of probable cause filed Oct. 27, 1931.
21. Pltf.'s exhibits 1 to 23, inclusive, withdrawn and transmitted as physical exhibits.
22. Deft.'s exhibits A to X, inclusive, withdrawn and transmitted as physical exhibits.
23. Order consolidating cases for appeal.
24. Petition for appeal.
25. Order allowing appeal.
26. Assignments of error.
27. Citation.
28. Precipe for transcript and printing.
29. Certificate of the clerk.
30. Narrative form bill of exceptions.
31. Orders of court transmitting all exhibits to Court of Appeals.

CASE NO. 15762

1. Petition.
2. Deft.'s motion to dismiss.
3. Answer.
3a. Order consolidating cases for trial.
254 4. Stipulation of facts.
5. Journal entries of May 14 and 15, 1931.
6. Waiver of jury.
7. Order of judgment.
8. Certificate of probable cause.

IN CASE 15763

10. Petition.
11. Deft.'s motion to dismiss.
12. Answer.
12a. Order consolidating cases for trial.
13. Stipulation of facts.
14. Journal entries of May 14 and 15, 1931.
15. Waiver of jury.
16. Order of judgment.
17. Certificate of probable cause.

IN CASE 15764

19. Petition.
20. Motion to dismiss.
21. Answer.
21a. Order consolidating cases for trial.
22. Journal entries of May 14 and 15, 1931.
23. Waiver of jury.
24. Stipulation of facts.
25. Order of judgment.
26. Certificate of probable cause.

IN CASE 15765

28. Petition.
29. Motion to dismiss.
30. Answer.
30a. Order consolidating cases for trial.
31. Stipulation of facts.
31a. Waiver of jury.
32. Order of judgment.
33. Certificate of probable cause.
34. Journal entries of May 14–15, 1931.

W. J. MAHON,
Attorney for Defendant.

Copy served on pltff.

J. B. OSMUN.

255 [Clerk's certificate to foregoing transcript omitted in printing.]

260 In United States District Court, the Northern District of Ohio, Eastern Division

Nos. 15761, 15762, 15763, 15764, 15765

[Title omitted.]

Motion for judgment

Now comes the defendant by his attorney, Wilfred J. Mahon, United States attorney for the northern district of Ohio, and moves the court for judgment in favor of the defendant and against plaintiff, dismissing plaintiff's petitions on each of the following grounds:

1. The provisions of section 424 of the Revenue Act of 1928 deprive plaintiff of its privilege of refund of manufacturer's excise tax paid or collected under the provisions of sections 900 (3) of the Revenue Act of 1921, and 600 (3) of the Revenue Act of 1924 in actions instituted subsequent to April 30, 1928.

2. The provisions of section 424 of Revenue Act of 1928
261 deprive plaintiff of its privilege of instituting and maintaining these actions for the recovery of manufacturer's excise tax paid or collected under the provisions of section 900 (3) of the Revenue Act of 1921, and 600 (3) of the Revenue Act of 1924 subsequent to April 30, 1928.

3. The provisions of section 424 of the Revenue Act of 1928 are a limitation on the provisions of Section 3226 of the Revised Statutes as amended by the provisions of section 1113 A of the Revenue Act of 1926.

4. The provisions of section 424 of the Revenue Act of 1928 are a limitation on the provisions of section 563 of the Revised Statutes and this court is without jurisdiction to hear and determine such actions.

5. Plaintiff has failed to sustain by the evidence adduced at the trial of these cases, the burden of proof placed on it in these actions.

6. The evidence adduced at the trial of these cases conclusively shows that the batteries manufactured and sold by plaintiff during the taxable periods involved, upon which the tax in question was paid, were manufactured and sold as parts or accessories of automobile trucks, automobile wagons and other automobiles.

7. The evidence adduced at the trial of these cases conclusively shows that the batteries manufactured and sold by plaintiff during the taxable periods involved, upon which the tax in question was imposed, were primarily adapted for use in automobile trucks, automobile wagons, and other automobiles.

8. All of the tax in question in these actions, was voluntarily paid to the collector of internal revenue for the eighteenth collection district of Ohio, without protest or duress.

Wherefore, defendant prays that plaintiff's petitions be dismissed and that he be allowed to go hence with his costs.

WILFRED J. MAHON,
United States Attorney.

262 [Minute entry of argument and submission, Feb. 13, 1933, omitted in printing.]

In United States Circuit Court of Appeals, Sixth Circuit

Judgment

Filed May 9, 1933

Appeal from the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

264 [File endorsement omitted.]

In United States Circuit Court of Appeals, Sixth Circuit

No. 6181

C. F. ROUTZAHN, COLLECTOR OF INTERNAL REVENUE OF THE UNITED States for the Eighteenth District of Ohio, Appellant

vs.

WILLARD STORAGE BATTERY COMPANY, A CORPORATION, APPELLEE

Appeal from the District Court of the United States for the Northern District of Ohio, Eastern Division

Opinion filed May 9, 1933

Before HICKS, HICKENLOOPER, and SIMONS, Circuit Judges

SIMONS, Circuit Judge: The suit below was for the recovery of manufacturers' excise tax paid on the manufacture and sale of elec-

tric storage batteries, and collected under the provisions of sections 900 (3) of the Revenue Act of 1921, and 600 (3) of the Revenue Act of 1924. The taxpayer obtained judgment, and the collector appeals.

Two questions are presented: (1) Are the taxpayer's storage batteries "parts and accessories" of automotive vehicles within the meaning of the applicable statutes and the regulations of the Commissioner of Internal Revenue; (2) does section 424 of the Revenue Act of 1928 deprive the United States courts, in a suit against the collector, of jurisdiction to determine whether the taxes here involved were erroneously and illegally assessed and collected, and vest the determination of such question exclusively in the Commissioner?

265 Section 900 of the 1921 act is printed in the margin.[1] So far as the issues in this case are involved, section 600 of the 1924 act is the same, and both are identical with the corresponding section of the Revenue Act of 1918, which was the first act imposing the excise tax here in question. Section 900 has been construed by the Supreme Court in Universal Battery Co. v. United States, 281 U.S. 580, to the effect that subdivisions 1 and 2 thereof, with the introductory provision, contemplate that parts and accessories may be sold along with the vehicle by the manufacturer of the latter, and where this is done the tax is to be paid by the manufacturer of the vehicle. Subdivision 3, with the introductory provision, contemplates that parts and accessories may be sold separately from the vehicle by the manufacturer of the former to others than a manufacturer of the latter, and the tax on such sales is to be paid by the manufacturer of the parts and accessories. We are here concerned only with taxes assessed and collected upon sales by the taxpayer to others than the manufacturers of automotive vehicles, since sales by the taxpayer to such manufacturers are tax free, and it is only resale by the latter that is taxed.

The administrative regulations issued under section 900 have construed the term "parts" therein as meaning any articles designed or manufactured for the special purpose of being used as, or to replace, component parts of such vehicle, and which by reason of some characteristic are not such commercial articles as ordinarily would be sold for general use, but are primarily adapted for use as component parts of such vehicle. They have also construed the term "accessories" as meaning any articles designed to be used in connection with such vehicle to add to its utility or ornamentation, and

[1] That from and after January 1, 1922, there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—

(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;

(2) Other automobiles and motorcycles (including tires, inner tubes, parts and accessories therefor sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;

(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivisions (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivisions (1) or (2), 5 per centum;

which are primarily adapted for such use whether or not essential to the operation of the vehicle. In the Universal Battery case, supra, the court held such construction to be admissible, saying,

266 "Certainly it would be unreasonable to hold that articles equally adapted to a variety of uses and commonly put to such uses, one of which is use in motor vehicles, must be classified as parts or accessories for such vehicles. And it would also be unreasonable to hold that articles can be so classified only where they are adapted solely for use in motor vehicles and are exclusively so used. Magone v. Wiederer, 159 U.S. 555, 559. We think the view taken in the administrative regulations is reasonable and should be upheld. It is that articles primarily adapted for use in motor vehicles are to be regarded as parts or accessories of such vehicles, even though there has been some other use of the articles for which they are not so well adapted."

Of vital significance is the application made by the Supreme Court of its rule of construction to the issues involved in the five cases disposed of by its single opinion in the above case. In no. 127 the District Court found that the storage batteries there involved had been for several years used in motor vehicles, but made no finding as to whether they were primarily adapted for such use, or were equally adapted for other uses. This was a material issue. The case was reversed, and remanded for complete findings. In no. 275, storage batteries were likewise involved. The District Court made a special finding that they were of a type specially suitable for use on automobiles as replacements, and were not adapted to any other primary purpose or use. Judgment was affirmed. In no. 350 the tax was on sales of gascolaters, devices used on internal combustion engines to strain dirt, water, and foreign matter from the gasoline. The petition alleges that such devices were not parts or accessories of motor vehicles, but commercial articles sold for general use. This was a material issue, to which the findings made no definite response. Judgment was reversed, and the case remanded for complete findings. In no. 351 the tax was on replacement parts for speedometers. It was conceded that speedometers are accessories. It was found by the District Court that the parts were specially designed, manufactured, and sold for use on automobiles, and were not adapted to any other purpose or use. Judgment was affirmed. In no. 352 the tax was laid on brackets and fittings for automobile bumpers. They were designed, manufactured, and sold for such use, and were not adapted for any other. The judgment was affirmed.

In the light of the construction placed upon the statutes and regulations by the Supreme Court, and the manner of its appli-

267 cation to specific issues involved, we come to the consideration of the instant case. The district judge found that the taxpayer and its predecessors had been in the business of manufacturing storage batteries since 1896; that its batteries, prior to their use on automobiles, were commercial commodities widely, generally, and commonly sold for many different uses; that the first of its storage

batteries that were purchased for use on automobiles were the same in all essential respects as the batteries which had been commonly and widely used for a number of years for other purposes; that the automobile manufacturer adjusted the space in his automobile to fit the storage battery; that the storage battery was not designed especially for use on the automobile; that the parts of the storage batteries upon which the taxes in suit were paid were much the same as the parts of batteries manufactured by the predecessors of the plaintiff in 1895 or 1899, and that the only changes were those naturally due to refinement in the art of manufacture, and to competition in price; that none of these refinements made the batteries peculiarly adaptable for use only on automobiles, but that they continued to be equally adaptable for other uses where the duty requirements were the same; that the batteries manufactured by the taxpayer, and upon which the taxes in suit were paid, were commercial commodities which were commonly, generally and widely manufactured and sold for a great many different purposes; that there were no peculiar characteristics of such batteries which rendered them not such commercial articles as would ordinarily be sold for general use for a great many different purposes; that the uses of such electric batteries other than their use on automobiles were not incidental to their use on automobiles; that they were not peculiarly adaptable only for automobiles, but were equally well adaptable for use in stationary engines, marine engines, tractors, radios, and for a great many other purposes where the duty required was the same, and that they were so used; that they were not primarily adaptable for use only on automobiles, but were interchangeable for use in connection with automobiles, and with many other devices; that they were designed for use in all fields in which electricity in portable form was requred; that the duty requirement for use in automobiles was also required in various other uses, and that the batteries which were applied to these other uses were identical in design with the batteries used in connection with automobiles, and that such batteries were just as applicable for one use as for another where the duty requirement was the same.

268 Having found the facts as recited, the district judge came to the legal conclusion that the articles upon the sale of which taxes here involved were collected, are not parts or accessories of automotive vehicles within section 900 of the 1921 act, or section 600 of the 1924 act, and that the taxes were illegally assessed and collected. There remains for us only the inquiry as to whether the evidence supports the findings, and the findings the judgment. United States v. United States Fidelity Co., 236 U.S. 512, 527; Dooley v. Pease, 180 U.S. 126; Philadelphia & Reading Co. v. United States, 247 Fed. 466 (C.C.A. 3).

In support of its contention that storage batteries of the type here involved were in wide commercial use prior to the development of the automobile, that they were not designed primarily for

use in automotive vehicles, and that they are today widely sold for a great variety of uses to which they are as well adapted as to use in automobiles, the taxpayer marshaled a great wealth of evidence. In answer the collector produced none. He relies solely upon responses drawn from the taxpayer's witnesses, and on the inferences to be drawn therefrom. It would be idle for this court to attempt an analysis of the evidence presented by the somewhat substantial record. It is sufficient to say that we have given it careful consideration, and that it sustains the findings of the district judge.

It may be important, however, to note that while storage batteries had a somewhat wide use as early as 1880, their modern development began about 1893, when they were in use for train lighting, traction batteries, and railway signals. Later they came into use for carriage lighting, telephone, telegraph, and ignition in gas engines. In 1908 they began to be used for automobile lighting, but it was not until 1911 that Dr. Kettering applied the storage battery to the automobile for the combined purpose of starting, lighting, and ignition, and it is significant that he selected a standard battery in use for railway signal work for that purpose. It is also important to note that the catalogue of Willard storage batteries issued by Sipe and Sigler, the taxpayer's predecessors, in 1901, listed a great many uses for their commercial batteries other than for use in connection with automobiles. Likewise, the testimony shows that storage batteries equally applicable to automobiles, and upon which the taxes in suit were paid, were used from 1922 until 1926, the taxable period here involved, for some eighty or more different purposes, each unconnected or unrelated to use on automobiles. It
269 seems to us no answer to this evidence to say that a battery of the size and power to meet the requirements of a given automobile is primarily adapted for use with such automobile when the evidence is so conclusive that the size and type of battery furnished to purchasers is determined not by the manner or place of use, but by its duty requirements.

Giving due consideration to the rule that the burden is on the taxpayer to prove all of the facts establishing the invalidity of the tax, United States v. Anderson, 269 U.S. 422; Metcalf and Eddy v. Mitchel, 269 U.S. 514; Wickwire v. Reinecke, 275 U.S. 101, we are of the opinion that the findings of the District Court are in response to the evidence, and we agree with its conclusion that the taxpayer's product, upon the sales of which the disputed taxes were assessed and collected, are not automobile parts and accessories within the meaning of the applicable statutes and regulations. We thus find ourselves in accord with the majority of the Court of Appeals for the Third Circuit upon identical issues in Blakely D. McCaughn, Collector v. Electric Storage Battery Co., — Fed. (2d) —, decided January 31st, 1933. We find nothing in the opinion of the Court of the Second Circuit in Robert O. Eaton, Collector v. American Chain Co., — Fed. (2d) —, decided March 7, 1933, to persuade us otherwise. The articles on which alleged erroneous taxes were as-

sessed in the latter case were "weed chains." There was no showing that the specific chains sold, and for which the tax was imposed, were designed and primarily adapted for any other specific use than that on automobiles. Moreover, the development of tire chains followed the development and general use of the automobile, and was in response to a need presented by it. Finally, "weed chains" are articles covered by United States patent, and the patent clearly specifies them as primarily useful on automobiles to prevent skidding. It may well have been thought that the description and specification of the patent, without more, are conclusive on the question of their primary adaptability. See also Philadelphia Storage Battery Co. v. Lederer, 21 Fed. (2d) 320 (D.C.); General Lead Battery Co. v. United States, 60 Fed. (2d) 177 (Ct. of Cl.).

We come then to the second question to be decided. Is recovery barred by section 424 of the Revenue Act of 1928, printed in
270 the margin?[2] The collector's contention is that this section ousts the jurisdiction of the court to determine whether taxes have been illegally assessed and collected in a suit not begun prior to April 30, 1928, and vests such jurisdiction exclusively in the Commissioner of Internal Revenue. It has long been established that taxpayers have a common law right recognized by statute to sue the Collector in a court of the United States for the recovery of taxes wrongfully collected. This is conceded by the Collector. Such actions are personal in their nature, equitable in character, and are as for money had and received. Duffin v. Lucas, 55 Fed. (2d) 786, 792 (C.C.A. 6); Sage v. United States, 250 U.S. 33, 37. When the suit is begun it cannot be known with certainty that the judgment will be paid out of the Treasury. That depends upon the certificate of the court in the case. Smietanka v. Indiana Steel Co., 257 U.S. 1, 5. It is true that in this instance the certificate has been made, but the intended scope of the action, as in the Smietanka case, must be judged by its possibilities under the statutes that deal with it. To give effect to the Collector's contention would be to hold that section 424 not only repeals as to suits for recovery of such taxes as are here involved, begun after April 30, 1928, all of the statutes which recognize the taxpayer's right to sue the collector, but destroys the right itself. If such were the intention of the Congress, it has fallen far short of expressing it. Section 424 deals not with rights of action, but with limitations upon the power of the Commissioner to make refunds. Its provisions are not in conflict with the general

[2] No refund shall be made of any amount . . . collected from any manufacturer (of parts for automobiles) . . . unless either
(1) pursuant to a judgment of the Court in an action duly begun prior to April 30, 1928; or
(2) it is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of an article subject to tax, or that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee was returned to him; or
(3) the Commissioner certifies to the proper disbursing officer that such manufacturer . . . has filed . . . a bond . . . conditioned upon the immediate repayment to the United States of such portion of the amount refunded as is not distributed by such manufacturer, . . . within six months after the date of the payment of the refund to the persons who purchased . . . the articles in respect of which the refund is made. . . .

provisions of law authorizing suits for refund of taxes. Boyle Valve Co. v. United States, 38 Fed. (2d) 135, (Ct. of Cl.); American Chain Co. v. Eaton, 58 Fed. (2d) 248 (D.C.), reversed on other grounds in Eaton, Collector v. American Chain Co., supra; Electric Storage Battery Co. v. McCaughn, 52 Fed. (2d) 205 (D.C.), affirmed by McCaughn, Collector v. Electric Storage Battery Co., supra.

We agree with the authorities above cited, not only in reliance upon familiar principles governing repeal by implication, but also because the section appears to us to have an obvious literal meaning perfectly applicable to refunds by the Commissioner after judicial determination of the legality of the tax.

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Article 1255, Regulations of the Treasury No. 74 (1928), provides for the filing of claims for refund in cases where judgment is obtained against the collector. To such claims must be annexed inter alia a certified copy of the final judgment and a certificate of probable cause. They must not be confounded with claims for refund under section 3226, R.S., as a prerequisite to the bringing of suit either in the Court of Claims against the United States, or in the District Court against the collector. Until claim for refund under regulation 74 is made there is no occasion for administrative decision thereunder. When, however, final administrative determination is invoked, the mandate of section 424 forbids the refund unless the taxpayer can bring himself within the provisions of paragraphs 1, 2, or 3. If the claim for refund is made pursuant to a judgment of the court in an action begun prior to April 30, 1928, the Commissioner is not forbidden to refund under the applicable statute, and this may well be without qualification, although this we are not required to decide. Failing to bring himself within the condition of paragraph 1, because of not having pursued his claim to judgment in an action begun prior to the critical date, the taxpayer must (2) establish to the satisfaction of the Commissioner (a) that the amount claimed was in excess of the amount properly payable upon the sale of the article subject to tax, (b) that such amount was not collected directly or indirectly from the purchasers, or (c), that such amount, although collected from the purchasers, was returned to them. Failing in bringing himself within the provisions of paragraph 2, the taxpayer must under paragraph 3 file a bond conditioned upon his repayment to the purchasers such amount of the tax as has not been distributed, and secure certification by the Commissioner to the proper disbursing officer that such bond has been filed. Whether or not there can be judicial review of decisions by the Commissioner in the event that he acts arbitrarily or through caprice, we are not in this case called upon to decide. Reading the section literally, however, with the alternative provisions of its several paragraphs in mind, the purpose of the Congress to prevent the manufacturer from enriching himself by recovery of a tax that he has himself not paid but has passed on to the consumer, appears in bold relief. It is also

clear from the legislative record of the section. It follows from what we have said that the judgment of the court below must be affirmed.

So ordered.

272 [Clerk's certificate to foregoing transcript omitted in printing.]

273 Supreme Court of the United States

Order allowing certiorari

Filed October 9, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

274 File no. 37,932. U.S. Circuit Court of Appeals, Sixth Circuit. Term no. 329. C. F. Routzahn, Collector of Internal Revenue of the United States for the Eighteenth District of Ohio, petitioner, vs. Willard Storage Battery Company. Petition for a writ of certiorari and exhibit thereto. Filed August 9, 1933. File no. 329 O.T. 1933.

U. S. GOVERNMENT PRINTING OFFICE: 1933

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CITATIONS

Cases:

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No.

C. F. ROUTZAHN, COLLECTOR OF INTERNAL REVENUE of the United States for the Eighteenth District of Ohio, petitioner

v.

WILLARD STORAGE BATTERY COMPANY, A Corporation

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General on behalf of C. F. Routzahn, Collector of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Sixth Circuit entered in the above case May 9, 1933.

OPINIONS BELOW

The opinion of the District Court for the Northern District of Ohio (R. 52) is not reported.[1] The

[1] An opinion overruling motions to dismiss, not in the record, is not officially reported but may be found in 8 Am. Fed. Tax Reports 11274.

opinion of the Circuit Court of Appeals (R. 261) is reported in 65 F. (2d) 89.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 9, 1933 (R. 261). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the chief use of an article may be disregarded in determining whether it is "primarily adapted" for use on automobiles within the meaning of Section 900 of the Revenue Act of 1921 and Section 600 of the Revenue Act of 1924.

2. Whether Section 424 of the Revenue Act of 1928 requires as a prerequisite to a suit for the recovery of taxes that the decision of the Commissioner of Internal Revenue be first obtained with respect to whether or not the taxpayer has borne the economic burden of the tax.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set out in the Appendix, *infra*, pp. 13–18.

STATEMENT

Five actions at law were commenced in the District Court for the Northern District of Ohio for the recovery of manufacturer's excise taxes paid on the manufacture and sale of electric storage batteries for the taxable periods September 1922 to

February 1926, inclusive, in the aggregate amount of $744,023.58 and interest.

A motion to dismiss was filed in each case (R. 18, 148, 176, 203, 226), upon the ground that the court was without jurisdiction. These motions were overruled and exceptions were noted (R. 19). The five actions were consolidated for trial (R. 26, 151, 179, 207, 230), and the case was tried before the District Court, jury being waived (R. 26, 154, 183, 208) upon stipulations of facts (R. 24, 152, 179, 209, 230), and certain oral testimony and documentary evidence. The court made findings of fact (R. 37), from which the following appears (R. 39–40):

> 9. That none of the storage batteries upon the sales of which the taxes in suit were paid were sold to manufacturers of automobiles, but the majority of them were sold by the plaintiff to jobbers, distributors, and storage battery and electrical service dealers, and the plaintiff does not know, nor can it ascertain, the uses to which the said storage batteries so sold by it were put.
>
> 10. That storage batteries, prior to their use on automobiles, were commercial commodities widely, generally, and commonly sold for many different uses.
>
> 11. That the first storage batteries which were purchased for use on automobiles were the same in all essential respects as the batteries which had been commonly and widely used for a number of years for many other purposes.

12. That the automobile manufacturer adjusted the space in the automobile to fit the storage battery and the storage battery was not designed specially for use on the automobile.

13. That the parts of the electric storage batteries upon which the taxes in suit were paid were much the same as the parts of the storage batteries manufactured by the predecessors of the plaintiff in 1895 or 1899, the only changes being those naturally due to the refinement in art of manufacture during that period and to competition in price. None of these refinements made the batteries peculiarly adaptable for use only on automobiles, but they continued to be equally adaptable for use on any device where the duty requirements were the same.

14. That the storage batteries manufactured by the plaintiff and upon which the taxes in suit were paid were commercial commodities which were commonly, generally and widely manufactured and sold for a great many different purposes. There was no peculiar characteristic of these batteries which rendered them not such a commercial article as would ordinarily be sold for general use for a great many different purposes.

15. That the uses of said electric storage batteries, other than the use on automobiles, were not incidental to the use on automobiles.

16. That the storage batteries manufactured by the plaintiff, and upon which the taxes in suit were paid, were not peculiarly adaptable only for automobiles, but were

equally well adaptable for use in stationary engines, marine engines, tractors, radio, and for a great many other purposes where the duty required was the same, and were so used. Nor were they primarily adaptable for use only on automobiles. They were interchangeable for use in connection with automobiles or for use in connection with a great many other devices where the duty requirements were the same.

17. That the storage batteries manufactured by the plaintiff, and upon which the taxes in suit were paid, were not designed for the special purpose of being used on automobile trucks, automobile wagons, or other automobiles, but were designed for use also for uses in other fields in which electricity in portable form was required. The duty required for use in automobiles was also required in various other uses and the batteries which were applied to these other uses were identical in design with the batteries used in connection with automobiles. Said batteries were just as applicable for one use as for another where the duties required were the same.

Upon these findings the court concluded as a matter of law that the batteries were not parts or accessories within the meaning of the statutes and that the taxes were illegally assessed and collected (R. 41). Judgments were accordingly entered for the respondent (R. 54, 155, 183, 211, 234). The five actions were consolidated for the purpose of

appeal (R. 235), and the Circuit Court of Appeals for the Sixth Circuit affirmed the judgments of the District Court (R. 261).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In ignoring the chief or principal use as being determinative of the question whether the article is primarily adapted for use on automobiles.

2. In sustaining the jurisdiction of the District Court notwithstanding the failure of the respondent to comply with the provisions of Section 424 of the Revenue Act of 1928.

REASONS FOR GRANTING THE WRIT

1. In *Universal Battery Co.* v. *United States*, 281 U.S. 580, this Court approved the rule laid down by the Treasury regulations for determining the taxability of automobile parts and accessories, and said (p. 584):

> We think the view taken in the administrative regulations is reasonable and should be upheld. It is that articles primarily adapted for use in motor vehicles are to be regarded as parts or accessories of such vehicles, even though there has been some other use of the articles for which they are not so well adapted.

Thus the taxability of these articles turns upon whether they are "primarily adapted" for use on automobiles. However, the precise meaning of the term "primarily adapted" is a matter concerning

which there is a diversity of opinion in the courts. In *Eaton* v. *American Chain Co.*, 63 F. (2d) 783 (C.C.A. 2d),[2] the court expressed its view as follows (p. 786):

> We think such a conclusion ignores the chief or principal use as being determinative of the primary adaptation rule, referred to by the Supreme Court, * * *.

This view is in accord with *Magone* v. *Wiederer*, 159 U.S. 555, cited with approval in *Universal Battery Co.* v. *United States, supra*, p. 584. Two District Courts have also adopted this view. See *Weir* v. *McGrath*, 52 F. (2d) 201 (S.D. Ohio), affirmed, *per curiam*, 41 F. (2d) 1021 (C.C.A. 6th), and *Philadelphia Storage Battery Co.* v. *Lederer*, 21 F. (2d) 320 (E.D.Pa.).

In the case at bar the District Court found that the batteries were not primarily adaptable for use only on automobiles. It is clear, however, that the District Court's conception of the term "primarily adapted" is widely at variance with the meaning attributed to it in the *American Chain Co. case.* The District Court found, *inter alia* (R. 39–40) "the storage battery was not *designed specially* for use on the automobile"; "there was no *peculiar characteristic* of these batteries which rendered them not such a commercial article as would ordi-

[2] Petition for a writ of certiorari was filed in this case June 22, 1933, No. 196, October Term, 1933.

narily be sold for general use for a great many different purposes"; they "were not *peculiarly adaptable only* for automobiles, but were equally well adaptable for use in stationary engines, marine engines, tractors, radio, and for a great many other purposes where the duty required was the same, and were so used"; "*Nor* were they *primarily adaptable for use only* on automobiles. They were interchangeable for use in connection with automobiles or for use in connection with a great many other devices where the duty requirements were the same." (Italics ours.) The record contains no evidence that the other uses called for the same duty requirements.

The court below treated the case as presenting only the questions whether the evidence supports the findings and the findings the judgment (R. 264), and concluded that the findings of the District Court are in response to the evidence and support the judgment (R. 265). Thus it is clear that the court below has sanctioned a definition of "primarily adapted" which ignores the chief or principal use and confines the term to those articles which are peculiarly and exclusively adapted for use on automobiles, and on automobiles only.

There is thus a conflict between Circuit Courts of Appeals as to the meaning to be given to the term "primarily adapted." This is an important question of law which should be settled. Aside from the large amount of taxes involved in this

particular case, there are many other pending cases involving large sums which present the same general question.[1] The question is therefore one of large public interest and of great importance in the administration of the revenue laws.

2. The question of the jurisdiction of the courts in cases arising under Section 424 of the Revenue Act of 1928 (*infra*, pp. 14-15) is of unusual importance. As applied to this case that section requires that no refund shall be made unless it is established to the satisfaction of the Commissioner of Internal Revenue that the taxpayer has borne the economic burden of the tax. It is our view that this statute requires the taxpayer to secure the Commissioner's determination as to that question before suing in the courts to establish that his product is a nontaxable article. If the Commissioner determines that the taxpayer has borne the economic burden of the tax, it would be proper for the court also to inquire whether such action by the Commissioner was arbitrary. Thus all justiciable questions with respect to the refunding of the tax could be decided in one suit.

In this case the taxpayer brought suit in the District Court without attempting to satisfy the Commissioner that it had borne the economic burden of the tax. The court below conceded that "the

[1] The Treasury Department advises that there are 98 cases pending in the courts involving over $5,000,000 in taxes and additional interest of more than $2,000,000.

purpose of the Congress to prevent the manufacturer from enriching himself by recovery of a tax that he has himself not paid but has passed on to the consumer, appears in bold relief" (R. 267), but held that the Commissioner's determination with respect to that matter was to be made after judicial determination of the legality of the tax. In adopting this construction of Section 424, the court relied on *Boyle Valve Co.* v. *United States,* 38 F. (2d) 135 (C.Cls.); *American Chain Co.* v. *Eaton,* 58 F. (2d) 248 (Conn.), reversed on other grounds, *Eaton* v. *American Chain Co.,* 63 F. (2d) 783 (C.C.A. 2d); *Electric Storage Battery Co.* v. *McCaughn* 52 F. (2d) 205 (E.D.Pa.), *affirmed, McCaughn* v. *Electric Storage Battery Co.,* 63 F. (2d) 715 (C.C.A. 3d).

Thus the court below construes this statute as authorizing the Commissioner of Internal Revenue to render its judgment ineffective by his determination that the taxpayer fails to satisfy the requirements of Section 424. By this construction of the statute the court below resolves the jurisdictional question against the Government. However, we submit that this construction raises a graver question than it solves. It is settled that no case or controversy in the constitutional sense is presented where Congress or an administrative officer has power to prevent the payment of a judgment of a Federal court, or where the parties are not concluded by the judgment. *Gordon* v. *United States,*

2 Wall. 561; 117 U.S. 697; *In re Sanborn,* 148 U.S. 222; *Hayburn's Case,* 2 Dall. 409; *United States* v. *Ferreira,* 13 How. 39. Accordingly, the construction adopted by the court below does not seem to sustain the jurisdiction.

We are advised that the Treasury has withheld payment of the judgment of the court in the *Electric Storage Battery Co. case, supra,* and requested the taxpayer to comply with the provisions of Section 424. The Treasury further advises that its files will require similar action in the instant case. Thus it appears that the judgment below has not fixed the rights of the respondent.

Two District Courts have held that Section 424 deprives them of jurisdiction in suits to recover automobile-accessories taxes. *Sterling Spring Co.* v. *Routzahn* (N.D. Ohio), not officially reported, but see VIII-2 Cumulative Bulletin 358; *Twentieth Century Mfg. Co.* v. *Hopkins* (N.D. Tex.), not officially reported, but see X-2 Cumulative Bulletin 408. The dissenting opinion in *McCaughn* v. *Electric Storage Battery Co.,* 63 F. (2d) 715, expresses the same view. The majority opinion, however, adopts the view that Section 424 is merely an administrative measure for the guidance of the Commissioner and that when recovery is sought by a suit in court rather than administratively, the section prescribes no condition which would prevent recovery. Under this view the question whether the taxpayer bore the economic burden of the tax

would be wholly eliminated from the case. In this respect the court below has adopted a construction of Section 424 which is in conflict with that of the Circuit Court of Appeals for the Third Circuit. It is also in conflict with the construction adopted by the Court of Claims in *Jefferson Electric Mfg. Co.* v. *United States*, 69 C.Cls. 150, in which case the Government has filed a petition for certiorari, No. 171, October Term, 1933.

The construction adopted by the court below is, we submit, erroneous. The proper practice under Section 424 is in much confusion, and the courts are generally reluctant to accept a construction which will deprive them of jurisdiction. Unless this confusion is resolved by a decision of this Court which will establish a settled rule, the diversity of opinion in the lower courts will result in extensive litigation.

Wherefore, it is respectfully submitted that the petition should be granted.

J. CRAWFORD BIGGS,
Solicitor General.

AUGUST, 1933.

APPENDIX

REVENUE ACT OF 1921, C. 136, 42 STAT. 227, 291

SEC. 900. That from and after January 1, 1922, there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—

(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;

(2) Other automobiles and motorcycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;

(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum;

* * * * *

REVENUE ACT OF 1924, C. 234, 43 STAT. 253, 322

SEC. 600. On and after the expiration of thirty days after the enactment of this Act there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the fol-

lowing percentage of the price for which so sold or leased.

(1) Automobile truck chassis and automobile wagon chassis sold or leased for an amount in excess of $1,000, and automobile truck bodies and automobile wagon bodies sold or leased for an amount in excess of $200 (including in both cases tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the sale thereof), 3 per centum. * * *;

(2) Other automobile chassis and bodies and motor cycles (including tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum. * * *;

(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 2½ per centum. * * *; (U.S.C., Title 26, Sec. 881.)

REVENUE ACT OF 1928, C. 852, 45 STAT. 791, 806

SEC. 424. REFUND OF AUTOMOBILE ACCESSORIES TAX.

(a) No refund shall be made of any amount paid by or collected from any manufacturer, producer, or importer in respect of the tax imposed by subdivision (3) of section 600 of the Revenue Act of 1924, or subdivision (3) of section 900 of the Revenue Act of 1921 or of the Revenue Act of 1918, unless either—

(1) Pursuant to a judgment of a court in an action duly begun prior to April 30, 1928; or

(2) It is established to the satisfaction of the Commissioner that such amount was in excess of

the amount properly payable upon the sale or lease of an article subject to tax, or that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him; or

(3) The Commissioner certifies to the proper disbursing officer that such manufacturer, producer, or importer has filed with the Commissioner, under regulations prescribed by the Commissioner with the approval of the Secretary, a bond in such sum and with such sureties as the Commissioner deems necessary, conditioned upon the immediate repayment to the United States of such portion of the amount refunded as is not distributed by such manufacturer, producer, or importer, within six months after the date of the payment of the refund, to the persons who purchased for purposes of consumption (whether from such manufacturer, producer, importer, or from any other person) the articles in respect of which the refund is made, as evidenced by the affidavits (in such form and containing such statements as the Commissioner may prescribe) of such purchasers, and that such bond, in the case of a claim allowed after February 28, 1927, was filed before the allowance of the claim by the Commissioner.

* * * * *

TREASURY REGULATIONS 47, REVISED DECEMBER 1921

ART. 15. *Definition of parts.*—A "part" for an automobile truck, automobile wagon, other automobile, or motorcycle is any article designed or manufactured for the special purpose of being used as or to replace a component part of any such ve-

hicle and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use and which is primarily adapted only for use as a component part of such vehicle.

* * * * *

Mere stock or commercial commodities, such as bolts, nuts, washers, screws, etc., though used as components for such vehicles, are not "parts" within the meaning of subdivision (3). Articles, however, which ordinarily would be classed as commercial commodities become parts when, because of their design or construction, they are primarily adapted for use as component parts of such vehicles.

* * * * *

ART. 16. *Definition of accessories.*—An "accessory" for an automobile truck, automobile wagon, other automobile, or motorcycle is any article designed to be attached to or used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for use in connection with such vehicle, whether or not essential to its operation.

* * * * *

Articles which have a general commercial use and which are not especially designed and peculiarly adapted for use in connection with automobile trucks, automobile wagons, other automobiles, or motorcycles are not subject to tax as "parts" or "accessories." * * *

If any doubt exists as to the special adaptability of any article, the fact of its sale by the manufacturer to be used with an automobile, or to an

automobile accessories dealer, would determine its taxability.

* * * * * *

TREASURY REGULATIONS 47, REVISED AUGUST 1924

ART. 16. *Parts or accessories—Definition of parts.*—A "part" for an automobile truck, automobile wagon, or other automobile chassis or body, or motorcycle, is any article designed or manufactured for the special purpose of being used as, or to improve, repair, or replace, a component part of any such vehicle or article, and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use or which is primarily adapted only for use as a component part of such vehicle or article.

Definition of accessories.—An "accessory" for an automobile truck, automobile wagon, or other automobile chassis or body, or motorcycle, is any article designed to be attached to or used in connection with such vehicle or article to add to its utility or ornamentation, or any article which is primarily adapted for use in connection with such vehicle or article whether or not essential to its operation or use.

* * * * *

Articles which have a general commercial use and which are not especially designed or peculiarly adapted for use in connection with automobile truck, automobile wagon, or other automobile chassis or bodies, or motorcycles, are not subject to tax as "parts or accessories." * * *.

Mere stock or commercial commodities such as bolts, nuts, washers, screws, etc., though used as components for taxable articles, are not "parts"

within the meaning of subdivision (3) when sold separately. Articles, however, which ordinarily would be classed as commercial commodities become parts when, because of their design or construction, they are primarily adapted for use as component parts of such vehicles.

* * * * *

Parts or accessories for automobile trucks, automobile wagons, other automobiles, or motorcycles, primarily adapted for use on or in connection therewith are taxable when sold by the manufacturer thereof regardless of the purpose for which used.

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 329

C. F. ROUTZAHN, COLLECTOR OF INTERNAL REVENUE of the United States for the Eighteenth District of Ohio, petitioner

v.

WILLARD STORAGE BATTERY COMPANY, A CORPORATION

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the District Court for the Northern District of Ohio (R. 32) is not reported.[1] The opinion of the Circuit Court of Appeals (R. 154) is reported in 65 F. (2d) 89.

[1] An opinion overruling motions to dismiss, not in the record, is not officially reported but may be found in 8 Am. Fed. Tax Reports 11274.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 9, 1933 (R. 154). The petition for a writ of certiorari was filed August 9, 1933, and was granted October 9, 1933. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether Section 424 of the Revenue Act of 1928 requires as a prerequisite to a suit for the recovery of automobile accessories taxes that the decision of the Commissioner of Internal Revenue be first obtained with respect to whether the claimant has himself borne the burden of the tax?

2. Whether the chief or principal use of an article determines whether it is "primarily adapted" for use on automobiles, within the meaning of Section 900 of the Revenue Act of 1921 and Section 600 of the Revenue Act of 1924.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set out in the Appendix, *infra*, pp. 22–27.

STATEMENT

Five actions at law were commenced in the District Court for the Northern District of Ohio for the recovery of manufacturer's excise taxes paid on the manufacture and sale of electric storage bat-

teries for the taxable periods September 1922 to February 1926, inclusive, in the aggregate amount of $744,023.58, and interest (R. 22).

A motion to dismiss was filed in each case (R. 9, 94, 108, 122, 135), upon the ground that the court was without jurisdiction. These motions were overruled and exceptions were noted (R. 10). The five actions were consolidated for trial (R. 15, 96, 110, 124, 138), and the case was tried before the District Court, jury being waived (R. 14, 98, 112, 125), upon stipulations of facts (R. 13, 96, 111, 125, 138), and certain oral testimony and documentary evidence. The court made findings of fact (R. 22), from which the following is taken (R. 23–24):

> 9. That none of the storage batteries upon the sales of which the taxes in suit were paid were sold to manufacturers of automobiles, but the majority of them were sold by the plaintiff to jobbers, distributors, and storage battery and electrical service dealers, and the plaintiff does not know, nor can it ascertain, the uses to which the said storage batteries so sold by it were put.
>
> 10. That storage batteries, prior to their use on automobiles, were commercial commodities widely, generally and commonly sold for many different uses.
>
> 11. That the first storage batteries which were purchased for use on automobiles were the same in all essential respects as the batteries which had been commonly and widely

used for a number of years for many other purposes.

12. That the automobile manufacturer adjusted the space in the automobile to fit the storage battery and the storage battery was not designed specially for use on the automobile.

13. That the parts of the electric storage batteries upon which the taxes in suit were paid were much the same as the parts of the storage batteries manufactured by the predecessors of the plaintiff in 1895 or 1899, the only changes being those naturally due to the refinement in art of manufacture during that period and to competition in price. None of these refinements made the batteries peculiarly adaptable for use only on automobiles, but they continued to be equally adaptable for use on any device where the duty requirements were the same.

14. That the storage batteries manufactured by the plaintiff and upon which the taxes in suit were paid were commercial commodities which were commonly, generally and widely manufactured and sold for a great many different purposes. There was no peculiar characteristic of these batteries which rendered them not such a commercial article as would ordinarily be sold for general use for a great many different purposes.

15. That the uses of said electric storage batteries, other than the use on automobiles, were not incidental to the use on automobiles.

16. That the storage batteries manufactured by the plaintiff, and upon which the

taxes in suit were paid, were not peculiarly adaptable only for automobiles, but were equally well adaptable for use in stationary engines, marine engines, tractors, radio, and for a great many other purposes where the duty required was the same, and were so used. Nor were they primarily adaptable for use only on automobiles. They were interchangeable for use in connection with automobiles or for use in connection with a great many other devices where the duty requirements were the same.

Upon these findings the court concluded as a matter of law that the batteries were not parts or accessories within the meaning of the statutes and that the taxes were illegally assessed and collected. (R. 25.) Judgments were accordingly entered for the respondent. (R. 31, 99, 113, 127, 140.)

The five actions were consolidated for the purpose of appeal (R. 141), and the Circuit Court of Appeals for the Sixth Circuit affirmed the judgments of the District Court (R. 154).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In sustaining the jurisdiction of the District Court notwithstanding the failure of the respondent to comply with the provisions of Section 424 of the Revenue Act of 1928.

2. In ignoring the chief or principal use as being determinative of the question whether the article is primarily adapted for use on automobiles.

SUMMARY OF ARGUMENT

I

The judgment of the District Court was improper in the absence of a finding that the respondent had established to the satisfaction of the Commissioner of Internal Revenue that the burden of the tax was actually borne by the respondent. Section 424(a)(2) of the Revenue Act of 1928 (*infra*, p. 23) confides to the Commissioner the power to determine whether a claimant has actually borne the burden of the tax. And even if we be wrong in that contention, this respondent must fail because of the absence of any finding of fact or conclusion of law by the trial court that this respondent did actually bear the burden of the tax.

II

The courts below erred in ignoring the chief, principal, and notorious use of storage batteries. *Universal Battery Co.* v. *United States*, 281 U.S. 580, approving the Treasury regulations in respect of automobile parts and accessories, cannot be interpreted to exclude as the criterion the chief and principal use of a product. *Eaton* v. *American Chain Co.*, 63 F. (2d) 783 (C.C.A. 2d). Cases in which automobile storage batteries have been held to be not taxable have been based upon findings of equal adaptation and have ignored chief or principal use. Congress intended to use the expression "parts or accessories" in the ordinary, popular,

and commercial sense. *Weir* v. *McGrath,* 52 F. (2d) 201 (S.D. Ohio), affirmed *per curiam,* 41 F. (2d) 1021 (C.C.A. 6th). The Revenue Act of 1932 shows that Congress wished to correct a too technical interpretation of the statute by the courts.

ARGUMENT

I

THE JUDGMENT OF THE DISTRICT COURT WAS IMPROPER IN THE ABSENCE OF A FINDING THAT THE RESPONDENT HAD ESTABLISHED TO THE SATISFACTION OF THE COMMISSIONER OF INTERNAL REVENUE THAT IT ACTUALLY BORE THE BURDEN OF THE TAX

Regardless of the applicability of Sections 900 and 600 of the Revenue Acts of 1921 and 1924, respectively, we contend that Section 424 of the Revenue Act of 1928 (*infra,* pp. 23–24) prevents recovery by this respondent. This section forbids the refund of automobile parts or accessories taxes to a manufacturer unless—

> *It is established to the satisfaction of the Commissioner* that such amount * * * was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him; * * *[2]

[2] Section 424 prescribes three other situations in which such refunds may be made: (1) If pursuant to a judgment of a court in a suit instituted prior to April 30, 1928; (2) if the amount is an overpayment of tax upon an article properly taxable; or (3) if the manufacturer has filed a bond to repay such portion of the refund as is not distributed to the purchasers of the articles.

In the instant case the Circuit Court of Appeals decided in effect that it was enough that the court then determine the legality or illegality of the tax, leaving the question as to whether the manufacturer had actually borne the burden of the tax to be settled later between the respondent and the Commissioner.

In the court below it was contended by the Government, as we now contend here, that Section 424 reserves to the Commissioner exclusive power to decide whether any claimant actually bore the burden of the tax. But if this Court shall not so decide, it is our further contention that in any event this respondent must fail because of failure to show that it actually bore the burden of the tax. This question is discussed in the brief for the Government in *United States* v. *Jefferson Electric Manufacturing Company,* No. 171, October Term, 1933. In that case the Government's contentions are the same as those we make here, except that in that case there was an attempt to show in court that the respondent bore the burden of the tax.

As was noticed by the court below, the purpose of Congress was to allow the refund of a tax illegally collected only if the manufacturer had not in effect passed the tax on to the consumer. We contend that the question whether a claimant has borne the burden of the tax is confided by statute to the discretion of the Commissioner of Internal Revenue, for no other reasonable reading can be made of a statute which forbids a refund unless "it is estab-

lished to the satisfaction of the Commissioner" that the amount was not collected directly or indirectly from customers.

In *American Chain Co.* v. *Eaton,* No. 196, October Term, 1933, the same question is involved. The Circuit Court of Appeals for the Second Circuit in that case did not rule upon the effect of Section 42 because it held that the product was taxable and that therefore the claimant could not recover, whether it or someone else had borne the economic burden. In the *American Chain case* the trial court held that the plaintiff had borne the burden of the tax. In our brief in the *American Chain case* we dispute the validity of that finding.

Whatever this Court may conclude as to the *American Chain case* and the *Jefferson Electric case,* the respondent must fail in this case, since there is no finding or holding that it bore the burden of the tax.

II

THE STATUTE IS APPLICABLE TO PARTS AND ACCESSORIES CHIEFLY OR PRINCIPALLY USED IN CONNECTION WITH AUTOMOBILES

The Circuit Court of Appeals held that it would not reverse the conclusion of the District Court that the storage batteries sold by the respondent were not parts or accessories of automotive vehicles within Section 900 of the Revenue Act of 1921 or Section 600 of the Revenue Act of 1924

(*infra*, p. 22), and that it could only inquire as to whether or not the evidence supported the findings."

It is our contention that the District Court erred in its construction of the statutes by ignoring the chief, principal, and notorious use of storage batteries in determining that the respondent's batteries were not primarily adapted for use on automobiles, and were therefore not taxable. This presented a question of law which should have been passed on below.

The testimony shows what would seem to be a matter of common knowledge that the greatest use of batteries is in connection with the starting and lighting of automobiles. (R. 49.) Few comparisons or statistics were produced to show the extent of other uses of batteries as described in testimony, such as road machines, marine engines, plows, gasoline shovels, tractors (R. 51); radios (R. 57); fire departments (R. 63); farm machinery (R. 74). None of the testimony does more than suggest that a limited number of storage batteries of the type used on automobiles were used in the taxable years in connection with other kinds of machinery.

A "part" is defined in Article 15 of Regulations 47 (*infra*, p. 24) as—

> any article designed or manufactured for the special purpose of being used as or to replace

[1] The principal findings thus referred to by the Circuit Court of Appeals are reprinted in the statement, *supra*, pp. 3–5.

> a component part of any such vehicle and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use and which is primarily adapted only for use as a component part of such vehicle.

Article 16 of Regulations 47 (*infra*, p. 25) defines an "accessory" as

> any article designed to be attached to or used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for use in connection with such vehicle, whether or not essential to its operation.

Section 900 of the Revenue Act of 1921 (*infra*, p. 22) was considered in *Universal Battery Co.* v. *United States*, 281 U.S. 580. This Court noticed the regulations issued under Section 900 which we have just referred to, and said (p. 583):

> This construction of those terms has been adhered to in the Internal Revenue Bureau for about ten years and it ought not to be disturbed now unless it be plainly wrong. We think it is not so, but is *an admissible construction. Certainly* it would be unreasonable to hold that articles equally adapted to a variety of uses and commonly put to such uses, one of which is use in motor vehicles, must be classified as parts or accessories for such vehicles. *And it would be also unreasonable to hold that articles can be so classified only where they are adapted solely for use in motor vehicles and are exclusively so used.*

> *Magone* v. *Wiederer*, 159 U.S. 555, 559. We think the view taken in the administrative regulations is reasonable and should be upheld. It is that articles primarily adapted for use in motor vehicles are to be regarded as parts or accessories of such vehicles, even though there has been some other use of the articles for which they are not so well adapted. (Italics ours.)

There is nothing in that language, or in the Regulations to which it refers, which says that chief, principal and notorious use cannot be determinative of the adaptability of a device; and we contend that in a case like this casual, dispersed uses should not be allowed to make invalid the collection of a tax which legislator and citizen alike must have thought due under Section 900.

The precise meaning of the term "primarily adapted" has caused a diversity of opinion in the courts. In *Eaton* v. *American Chain Co.*, 63 F. (2d) 783 (C.C.A. 2d), now pending as No. 196, October Term, 1933, the Circuit Court of Appeals discussed findings of the District Court very similar to those made by the District Court in the instant case, namely, that the article was used otherwise than with automobiles and was equally adaptable for such uses, and therefore was not "primarily adapted" for use on automobiles. In reversing the District Court's decision in favor of the taxpayer the Circuit Court of Appeals said (p. 786):

> It was concluded below that the primary adaptation rule, referred to in *Universal*

> *Battery Co. v. United States, supra,* has no application to cases where the appellee, by evidence of subsequent untaxed resales, shows two uses, one of which is the admitted principal use on automobiles and the other is a possible exempted use even though it be a diverted use. *We think such a conclusion ignores the chief or principal use as being determinative of the primary adaptation rule, referred to by the Supreme Court,* and it also assumes evidence of untaxed resales for possible diverted uses, sufficient to override the primary adaptation rule. (Italics ours.)

The *American Chain* decision, we submit, is correct in its conclusion that when Congress levied a tax upon "parts or accessories", it was intending to reach things commonly considered to be parts or accessories. The Regulations could not narrow the scope of the statutory language. When the Regulations refer to an article as "primarily adapted" they must mean that such article is one which is practically adapted to the automotive use and is principally used in that way. This is not to argue that the hammer which may be used in making automobile repairs is a part of the automobile. That kind of object is specifically excluded by Article 16 (*infra*, p. 25) as a "mere commercial commodity". But where, as here, no attempt was made by the taxpayer to show that uses other than the automotive use were the chief or principal use of the batteries, it seems to us the taxpayer should fail.

The decision below, and that in *McCaughn* v. *Electric Storage Battery Co.*, 63 F. (2d) 715 (C.C.A. 3d),[1] amount in substance to a holding that if the article has any other possible use than on automobiles it cannot be said to be "primarily adapted" for use on automobiles.[2] But the regulation does not say "exclusively adapted"; it is only "primarily adapted." The word plainly connotes that there may be a secondary use on other objects.[3] In the *American Chain case*, the taxpayer seeks to avoid the tax through a showing that the chains could be used on machines other than automobiles. But it is a wholly artificial construction to say that the automobile tire chain, a device familiar to everyone, is not an automobile accessory. And the

[1] Other cases in which it has been held under findings as to "equally adapted" uses that automobile storage batteries were not taxable are *General Lead Batteries Co.* v. *United States*, 60 F. (2d) 177 (C.Cls.); *Yale Storage Battery Co.* v. *United States* (S.D.Ind.), unreported, but see Vol. 1, Prentice Hall Fed. Tax Service (1931), par. 1343; *Philadelphia Storage Battery Co.* v. *Lederer*, 21 F. (2d) 320 (E.D.Pa.); *United States Light & Heat Corp.* v. *United States*, 3 F. Supp. 861 (C.Cls.); *Exalert Mfg. Co.* v. *United States*, 3 F. Supp. 873 (C.Cls.); *Universal Battery Co.* v. *United States*, 3 F. Supp. 878 (C.Cls.); *M. & M. Co.* v. *United States*, 3 F. Supp. 886 (C.Cls.).

[2] The Court of Claims in *Anthony Co.* v. *United States*, 36 F. (2d) 481, 482, said that "Evidence as to the proportionate number [of air pumps] used is relevant but not at all controlling—in fact, it is of comparatively little weight." We disagree of course with that conclusion, and we submit that if the chief or principal use is of any weight at all it must be of great weight.

situation is similar, we submit, with respect to the automobile storage battery.

In *Weir* v. *McGrath*, 52 F. (2d) 201 (S.D. Ohio), affirmed *per curiam*, 11 F. (2d) 1021 (C.C.A. 6th), a case involving the statute here under consideration, the court said (p. 204):

> Thus if the common, general, practical, predominating, and chief use of the carburetors is in connection with the operation of an automobile, the possible or occasional use in connection with other internal combustion gas engines will not defeat the construction that the carburetors were "automobile carburetors" or "parts" and within the classification or type of articles intended by Congress to be taxed.

In *Cole Storage Battery Co.* v. *United States*, 65 Ct.Cls. 161, 170, certiorari denied, 278 U.S. 641, where it was held that automobile storage batteries were taxable under Section 900 of the Revenue Acts of 1918 and 1921, the Court of Claims said:

> This case, in our opinion, turns upon the restricted issue as to whether a storage battery, especially adapted for and so designed and advertised as to meet the essential requirements of locomotive power, is a part or accessory of an automobile. The fact that a storage battery is available for use for a number of purposes other than for an automobile is not determinate of the issue. A variety of parts of an automobile are susceptible of use in other devices, and other

> parts, both as to form and functioning elements, existed long prior to the coming of the automobile itself. What seems to us to turn the contention is the fact that in a combination of various elements to function in a certain way the accomplishment of the purpose is only attainable where a gasoline engine is used by coupling certain elements up with a storage battery, and without its presence the mechanism is useless. We think, therefore, that where a manufacturer of storage batteries seeks the custom of the automobile trade, assures the latter of the especial qualities of his battery, and designs it as part of the automobile into which it is to be introduced, Congress intended by the taxing act to reach it as a source of revenue.

And in *Edison Storage Battery Co.* v. *United States*, 67 C.Cls. 543, 553, where it held that storage batteries manufactured, advertised, and sold for the supply of motive power in electrically propelled trucks were subject to the tax under Section 600 of the Revenue Act of 1924, the Court of Claims said:

> It is fair to assume that if Congress had intended in the use of the word "parts" to exempt the seller where the thing sold was used in connection with the operation of an automobile, automobile truck, or motor cycle, because of the fact that the article sold could be used for other purposes, or that only a small portion of the production of the seller was used in connection with automobiles, or automobile trucks, or because the article sold could be used for other purposes, or because

> it had been sold and used for other purposes before the passage of the act, * * * it would have stated as much in the act. Having failed to do this, it is fair to assume that it did not intend that a limited meaning should be given to the word "parts."

In these two cases it seems to us the Court of Claims took the proper view of the broad intent of Congress in taxing automobile "parts" or "accessories." The conclusion reached in these cases follows, we submit, this Court's decision in *Worth Bros. Co.* v. *Lederer*, 251 U.S. 507, where an excise tax was laid on the manufacture of "any part" of a shell. This Court was pressed with finely spun arguments, but said (p. 510):

> Congress did not intend to subject its legislation to such artificialities and make it depend upon distinctions so refined as to make a part of a shell not the taxable "part" of the law.

And see *Forged Steel Wheel Co.* v. *Lewellyn*, 251 U.S. 511; *Carbon Steel Co.* v. *Lewellyn*, 251 U.S. 501. Finally, this Court's decision in *Magone* v. *Wiederer*, 159 U.S. 555, cited in *Universal Battery Co.* v. *United States, supra*, took the view, with respect to an analogous question in a tariff case, that chief use is an important consideration. See also *Magone* v. *Heller*, 150 U.S. 70.

In the several cases in which it has been held that storage batteries for automobiles were not taxable as "parts or accessories" of automobiles, the

courts' conclusions were based on a "finding of fact" that the particular battery was not "primarily adapted" for use in connection with automobiles or was "equally adapted" for other uses. But as we have shown above, the regulations were not intended to limit the effect of the broad language of the statute which taxed "parts or accessories," and were not intended to require that the article be "exclusively adapted" for use on automobiles. The words in the regulations are to be given a sensible meaning, and so treated we contend that they do include one of the best known of automobile parts or accessories, the storage battery, an essential element of practically every automobile now running.

In cases where findings have been made that batteries were "equally adapted" for use other than in connection with an automobile, and this has been held the determinative fact, the courts have given undue weight, we submit, to varied and eccentric uses which have been suggested to them by proof, and they have ignored the chief or principal use which Congress had in mind when it taxed parts or accessories of automobiles. As a result they have held that the tax on the manufacture of the millions of automobile batteries actually used must fail. This, we submit, is too technical and too legalistic a construction of the statute and the regulations. Moving step by step and apparently logically, the lower courts have found themselves holding that a familar automobile part is "in fact"

not an automobile part. It seems unreasonable that members of Congress, when they voted for a bill taxing "parts or accessories" of automobiles, did not intend to tax a part or accessory familiar to all of them." Of course it is fundamental that words in a taxing statute should be given their ordinary and commonly understood meaning. *Woolford Realty Co.* v. *Rose*, 286 U.S. 319, 327; *Old Colony R. Co.* v. *Commissioner*, 284 U.S. 552, 560.

Section 606 (c) of the Revenue Act of 1932, c. 209, 47 Stat. 169, 262, specifically declares that storage batteries, tire chains, spark plugs, leaf springs, coils, and timers—

> which are suitable for use on or in connection with, or as component parts of, any of the articles enumerated in subsection (a) or (b) [automobiles, etc.] shall be considered parts or accessories for such articles, whether or not primarily adapted for such use.

Congress evidently thought that the court decisions had thwarted its intention to tax automobile

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" In *Weir* v. *McGrath*, 52 F. (2d) 201 (S.D.Ohio), affirmed *per curiam*, 41 F. (2d) 1021 (C.C.A. 6th), a case involving the question whether certain carburetors were automobile parts, the Court said (p. 204): "In giving such construction to the acts of Congress the rule is well settled that Congress must be deemed to use terms in their ordinary, popular, and commercial sense, rather than in a distinctive or technical sense, unless it clearly appear that the latter sense was intended. *Swan* v. *Arthur*, 103 U.S. 597, 598; *Maddock* v. *Magone*, 152 U.S. 368; *U.S.* v. *Buffalo Gas Fuel Co.*, 172 U.S. 339, 341."

parts or accessories. In Senate Report No. 665, 72nd Cong., 1st Sess., p. 44, it is said:

> The House bill contained a provision, which is retained by your committee, *to eliminate the effect of certain court decisions under which many parts and accessories have escaped tax under prior revenue acts on the ground that they were not "primarily adapted" for use on automobiles or trucks,* since they might be used on boats, tractors, etc. Under the bill, spark plugs, storage batteries, leaf springs, coils, timers, and tire chains, if suitable for use on automobiles and trucks, will be taxable as parts or accessories whether or not "primarily adapted" for such use. As to other parts and accessories, the test of taxability will be the same as under the prior laws, since those enumerated represent the principal items as to which question has arisen, and to extend the list would result in the inclusion of articles whose use on automobiles and trucks may be minor[7] as compared with their other uses. (Italics ours.)

We submit, therefore, that the decision below, by ignoring the chief, principal, and notorious use of storage batteries as parts of automobiles, has frustrated the operation of what was intended to be a tax upon parts of automobiles as they were com-

[7]Apparently the Senate Committee thought that the principal use of a product determines its taxability as a part or accessory of an automobile, else references to "minor use" on automobiles would not have been included.

monly and generally known by Congress and citizen alike.

CONCLUSION

The holding below disregarded the chief or principal use of a familiar mechanism when it held that the respondent's batteries were not primarily adapted to automobiles. For that reason its decision should be reversed. But regardless of the taxability of the batteries, the decision below should be reversed either (a) because the trial court had no jurisdiction until the Commissioner of Internal Revenue had ruled as to the incidence of the tax, or (b) because this respondent did not show that it actually bore the burden of the tax.

Respectfully submitted.

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NOVEMBER 1933.

APPENDIX

Revenue Act of 1921, c. 136, 42 Stat. 227, 291:

SEC. 900. That from and after January 1, 1922, there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased:

(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;

(2) Other automobiles and motorcycles (including tires, inner tubes, parts, and accessories thereto, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;

(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum.

* * * * *

Revenue Act of 1924, c. 234, 43 Stat. 253, 322:

SEC. 600. On and after the expiration of thirty days after the enactment of this Act there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following per-

centage of the price for which so sold or leased.

(1) Automobile truck chassis and automobile wagon chassis sold or leased for an amount in excess of $1,000, and automobile truck bodies and automobile wagon bodies sold or leased for an amount in excess of $200 (including in both cases tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the sale thereof), 3 per centum. * * *;

(2) Other automobile chassis and bodies and motorcycles (including tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum. * * *;

(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 2½ per centum. * * *

* * * * * *

(U.S.C., Title 26, Sec. 881.)

Revenue Act of 1928, c. 852, 45 Stat. 791, 866:

SEC. 424. REFUND OF AUTOMOBILE ACCESSORIES TAX

(a) No refund shall be made of any amount paid by or collected from any manufacturer, producer, or importer in respect of the tax imposed by subdivision (3) of section 600 of the Revenue Act of 1924, or subdivision (3) of section 900 of the Revenue Act of 1921 or of the Revenue Act of 1918, unless either—

(1) Pursuant to a judgment of a court in an action duly begun prior to April 30, 1928; or

(2) It is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of an article subject to tax, or that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him; or

(3) The Commissioner certifies to the proper disbursing officer that such manufacturer, producer, or importer has filed with the Commissioner, under regulations prescribed by the Commissioner with the approval of the Secretary, a bond in such sum and with such sureties as the Commissioner deems necessary, conditioned upon the immediate repayment to the United States of such portion of the amount refunded as is not distributed by such manufacturer, producer, or importer, within six months after the date of the payment of the refund, to the persons who purchased for purposes of consumption (whether from such manufacturer, producer, importer, or from any other person) the articles in respect of which the refund is made, as evidenced by the affidavits (in such form and containing such statements as the Commissioner may prescribe) of such purchasers, and that such bond, in the case of a claim allowed after February 28, 1927, was filed before the allowance of the claim by the Commissioner.

* * * * *

Treasury Regulations 47, Revised December 1921:

ART. 15. *Definition of parts.*—A "part" for an automobile truck, automobile wagon, other automobile, or motorcycle is any article designed or manufactured for the special

purpose of being used as or to replace a component part of any such vehicle and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use and which is primarily adapted only for use as a component part of such vehicle.

* * * * *

Mere stock or commercial commodities, such as bolts, nuts, washers, screws, etc., though used as components for such vehicles, are not "parts" within the meaning of subdivision (3). Articles, however, which ordinarily would be classed as commercial commodities become parts when, because of their design or construction, they are primarily adapted for use as component parts of such vehicles.

* * * * *

ART. 16. *Definition of accessories.*—An "accessory" for an automobile truck, automobile wagon, othe automobile, or motorcycle is any article designed to be attached to or used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for use in connection with such vehicle, whether or not essential to its operation.

* * * * *

Articles which have a general commercial use and which are not especially designed and peculiarly adapted for use in connection with automobile trucks, automobile wagons, other automobiles, or motorcycles are not subject to tax as "parts" or "accessories." * * *.

If any doubt exists as to the special adaptability of any article, the fact of its sale by the manufacturer to be used with an

automobile, or to an automobile accessories dealer, would determine its taxability.

* * * * *

Treasury Regulations 17, Revised August 1924:

ART. 16. *Parts or accessories. Definition of parts.* A "part" for an automobile truck, automobile wagon, or other automobile chassis or body, or motorcycle, is any article designed or manufactured for the special purpose of being used as or to improve, repair, or replace a component part of any such vehicle or article, and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use or which is primarily adapted only for use as a component part of such vehicle or article.

Definition of accessories. An "accessory" for an automobile truck, automobile wagon, or other automobile chassis or body, or motorcycle, is any article designed to be attached to or used in connection with such vehicle or article to add to its utility or ornamentation, or any article which is primarily adapted for use in connection with such vehicle or article whether or not essential to its operation or use.

* * * * *

Articles which have a general commercial use and which are not especially designed or peculiarly adapted for use in connection with automobile truck, automobile wagon, or other automobile chassis or bodies, or motorcycles, are not subject to tax as "parts or accessories." * * *

Mere stock or commercial commodities such as bolts, nuts, washers, screws, etc., though used as components for taxable ar-

ticles, are not "parts" within the meaning of subdivision (3) when sold separately. Articles, however, which ordinarily would be classed as commercial commodities become parts when, because of their design or construction, they are primarily adapted for use as component parts of such vehicles.

* * * * *

Parts or accessories for automobile trucks, automobile wagons, other automobiles, or motorcycles, primarily adapted for use on or in connection therewith are taxable when sold by the manufacturer thereof regardless of the purpose for which used.

U.S. GOVERNMENT PRINTING OFFICE 1933

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 329

C. F. ROUTZAHN, COLLECTOR OF INTERNAL REVENUE of the United States for the Eighteenth District of Ohio, petitioner

v.

WILLARD STORAGE BATTERY COMPANY

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The respondent has advanced certain arguments with respect to the constitutionality and application of Section 424 of the Revenue Act of 1928, which we desire to answer in this reply brief.

A

The respondent attacks the constitutionality of Section 424, however the section be construed. We have urged in our brief in *American Chain Co.* v. *Eaton,* No. 196, present term (pp. 12–14) that it was within the power of Congress to limit the right

of the taxpayer to a refund when the right was not linked to any substantial equity (see *Graham & Foster* v. *Goodcell*, 282 U.S. 409) and when unjust enrichment would result. The respondent, however, argues that the effect of the section is to recreate a liability for a tax that may be found to have been erroneously collected. We submit, however, that the effect of the section may not be so described. It does not tax articles that were exempt before its enactment; it simply prevents refunds to persons not equitably entitled to have them.

As we pointed out in the *American Chain Co.* brief (p. 12), the right to the refund had been limited by the Act of February 28, 1927 (c. 226, 44 Stat. 1250, 1254), and succeeding statutes embodying the same provisions. Section 424 of the 1928 Act did not further limit the right and, therefore, the respondent was not adversely affected by its enactment. The respondent's claims for refund were rejected June 21, 1927, on the ground that the respondent had indicated that it did not intend to prosecute the claims in accordance with Treasury Decision 4015 (VI–1 Cum. Bul. 299) outlining the procedure to be followed by the taxpayer in order to comply with the Act of February 28, 1927, *supra* (R. 9, 94, 108, 122 and 135). The provisions of Section 424 could only benefit the respondent, and the respondent had over ten months in which to commence a suit and secure the benefit. But the

respondent began no suit until May, 1929 (R. 1, 86, 100, 114, 128). We, therefore, do not think the respondent can complain that the result is unreasonable as applied to the facts presented here.

The respondent also contends that a construction of Section 424 which would place the making of refunds within the discretion of the Commissioner is violative of Section 1, Article 3, of the Constitution. It is, however, well settled that determinations of fact for administrative purposes may be intrusted to administrative officials without being subject to judicial review. *Phillips* v. *Commissioner*, 283 U.S. 589, 600; *Williamsport Wire Rope Co.* v. *United States*, 277 U.S. 551, 560-561; *United States* v. *Babcock*, 250 U.S. 328; *Silberschein* v. *United States*, 266 U.S. 221. We submit that the determination left to the Commissioner by Section 424 is one of fact, i.e., whether the taxpayer has borne the economic burden of the tax. We submit, therefore, that there is no prohibited encroachment upon the judicial power.

B

The respondent urges that the plain and unambiguous words of Section 424 do not permit of the construction contended for by the Government. The Government's argument that Congress intended to place the determination of fact required by the section in the discretion of the Commissioner is based upon the words of the statute "established

to the satisfaction of the Commissioner." (See the brief in *United States* v. *Jefferson Electric Mfg. Co.*, No. 171, present term (pp. 17–18, 20–21).) The respondent has not answered the Government's argument in this respect, and has not pointed out the words of the statute which in its opinion require a contrary construction.

The respondent supports the decision below on the ground that Section 424 is an administrative provision and applies solely to repayment and not to a right of action. We have urged in our brief in the *Jefferson Electric Mfg. Co.* case, *supra*, that the Congressional purpose in enacting the section is frustrated by construction that would allow a suit for the refund without making the rule of the statute applicable in a judicial proceeding (pp. 11–13). That argument is an alternative contention and is advanced only on the assumption that we may be incorrect in our view that the determination was left to the discretion of the Commissioner.

As a corollary to its contention the respondent urges that the time has not yet arrived to apply Section 424. We have shown in the *Jefferson Electric Mfg. Co.* brief, *supra*, that such a procedure destroys the jurisdiction of the Court to render any judgment at all because the Commissioner would then be empowered to refuse payment of a judgment of a Federal Court. *Gordon* v. *United States*, 2 Wall. 561. The taxpayer is required to obtain a determination by the Commissioner before bringing an action in Court (pp. 19–20).

CONCLUSION

The respondent failed to secure a determination by the Commissioner of Internal Revenue with respect to the facts required by Section 424, and the respondent did not prove in this suit the facts required by Section 424. Because of either or both of those failures the judgment in favor of the respondent should be reversed.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.

FRANK J. WIDEMAN,
Assistant Attorney General.

J. R. FILLMAN,
Attorney.

DECEMBER 1933.

U. S. GOVERNMENT PRINTING OFFICE: 1933

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922. No. 332.

C. F. ROUTZAHN, COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES FOR THE EIGHTEENTH DISTRICT OF OHIO, Petitioner,

v.

WILLARD STORAGE BATTERY COMPANY, a corporation.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

PHILIP DECHERT,
CHARLES C. NORRIS, Jr.,
of Dechert & Norris.
AUGUSTUS B. STOUGHTON,
Counsel for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933. No. 329.

C. F. Routzahn, Collector of Internal Revenue of the United States for the Eighteenth District of Ohio, Petitioner,

v.

Willard Storage Battery Company, a Corporation.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the District Court for the Northern District of Ohio (R. 52) is not reported. The opinion of the Circuit Court of Appeals (R. 261) is reported in 65 F. (2d) 89.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered May 9, 1933 (R. 261). Jurisdiction is invoked by Petitioner under Section 240(a) of the Judicial Code.

QUESTIONS PRESENTED.

Stated in Petition.

STATUTES AND REGULATIONS INVOLVED.

Section 900, Revenue Act of 1921, 42 St. L. 227 (Appendix p. A-12). Section 600, Revenue Act of 1924, 43 St. L. 253 (Appendix, p. A-12). Section 424, Revenue Act of 1928 (Appendix, p. A-13). Treasury Regulations 47, Art. 15, revised January, 1922 (Appendix, p. A-1). Treasury Regulations 47, Art. 16, revised August, 1924 (Appendix, p. A-1). Treasury Regulations 74, Art. 1255, 1928 (Appendix, p. A-2).

ARGUMENT.

1. AS TO PETITIONER'S FIRST GROUND.

This Court in 1930 settled the law involved in the case at bar and clearly defined a "part" for an automotive vehicle under the pertinent Revenue Laws in the case of UNIVERSAL BATTERY COMPANY v. UNITED STATES, 281 U. S. 580; 74 L. Ed. 1051 (1930), and in so doing approved the definition adopted by the Treasury Department. The short excerpt from the opinion in that case in the Petition for Certiorari does not reflect the decision in that it omits the controlling factors of the definition. This Court said:

> "The administrative regulations issued under Section 900 uniformly have construed the term 'part' in that Section as meaning any article designed or manufactured for the special purpose of being used as, or to replace, a component part of such vehicle, and which by reason of some characteristic is not such a commercial commodity as ordinarily would be sold for general use, but is primarily adapted for use as a component part of such vehicle. The regulations also have construed the term 'accessory' as meaning any article designed to be used in connection with such vehicle to add to its utility or ornamentation, and which is primarily adapted for such use whether or not essential to the operation of the vehicle.
>
> "This construction of those terms has been adhered to in the Internal Revenue Bureau for about ten years, and it ought not to be disturbed now unless it is plainly wrong. We think it is not so, but is an admissible construction. Certainly it would be unreasonable to hold that articles equally adapted to a variety of uses and commonly put to such uses, one of which is use in motor vehicles, must be classified as parts or accessories for such vehicles. And it would be also unreasonable to hold that articles can be so classified only where they are adapted solely for use in motor vehicles and are exclusively so used. Magone v. Wiederer, 159 U. S. 555, 559, 40 L. Ed. 258, 259, 16 Sup. Ct. Rep. 122. We think the view taken in the administrative regulations is reasonable and should

be upheld. It is that articles primarily adapted for use in motor vehicles are to be regarded as parts or accessories of such vehicles, even though there has been some other use of the articles for which they were not so well adapted."

The Regulations of the Treasury Department construing the term "part" in the Revenue Acts involved in the case at bar, and to which this Court referred in the above case, are set forth on page A-1 of the Appendix to this brief.

The Court below found that the Respondent's batteries were commercial commodities in wide, general and common use before they were used on automobiles (R. 39—Finding No. 10); that after they were used on automobiles they always continued to be, and now are, such commercial commodities in wide, general and common use for a great many different purposes (R. 40—Finding No. 14); that they were equally well adapted for a great many other uses other than on automobiles, and were so used (R. 40—Finding No. 16); that such other uses were not incidental to their use on automobiles (R. 40—Finding No. 15); that they were not designed for automobiles (R. 39—Finding No. 12); and were not primarily adapted for use on automobiles (R. 40—Finding No. 16). The Findings *in extenso* are printed in the Petition for Certiorari on pages 3, 4, and 5, and as stated by the Circuit Court of Appeals below (R. 264, 265) were supported by "a wealth of evidence," which was not controverted.

Every factor of the definition of this Court and of the Regulations of the Treasury Department determinative as to what does not constitute a "part" is fully and completely found upon a mass of uncontroverted evidence.

In the UNIVERSAL case, *supra*, this Court cited the case of MAGONE v. WIEDERER, 159 U. S. 555, 559, 40 L. Ed. 258, 259, 16 Sup. Ct. Rep. 122 (1895), which in turn cites the case of MAGONE v. HELLER, 150 U. S. 70; 37 L. Ed. 1001 (1893). These cases decide that the chief or principal use of an article is determinative of its proper tariff classification, *unless* at the same time the article is commonly, practically and widely used for other purposes, and that if it is equally well adapted for these other uses, it cannot be considered to

be an article primarily adapted for such use, even if in the majority of cases it is so used. The Court below found that the Respondent's batteries were commonly, practically and widely used for other purposes; were equally well adapted for these other uses; and were not primarily adapted for use on the automotive vehicles mentioned in the pertinent Revenue Acts. The Circuit Court of Appeals below in its opinion (R. 265) stated that the batteries in suit were equally applicable for some "eighty or more different purposes each unconnected, or unrelated to use on automobiles." This, together with the Findings of wide, general and common use and equal adaptation, to which reference has been made, under the authority of this Court in the UNIVERSAL case, *supra*, and the MAGONE v. WIEDERER case, *supra*, precludes the application of the test of chief use, and brings the definition of Respondent's batteries squarely within the language of this Court in the UNIVERSAL case, *supra*, to wit: **"Certainly it would be unreasonable to hold that articles equally adapted to a variety of uses and commonly put to such uses, one of which is use on motor vehicles, must be classified as parts or accessories for such vehicles."**

In another sense, the Court below did not disregard "chief use," for it refused the Petitioner's specific request to find that the chief use of the batteries in suit was on automobiles (R. 34—Request No. 14), (R. 42), and, to the contrary, found that they were commonly, widely and generally used for a great many other purposes, to which they were equally well adapted, and were so used, and were not primarily designed nor adapted for use on automobiles (R. 39, 40—Findings 10 to 17 inc.).

None of the cases cited by Petitioner are in conflict with the opinion of the Circuit Court of Appeals in the case at bar, but all are in complete harmony with each other and with the above cited decisions of this Court: PHILADELPHIA STORAGE BATTERY COMPANY v. LEDERER, 21 F. (2d) 320 (D. C. E. D. Pa. 1927), is not in conflict, and no appeal was taken from the judgment in favor of taxpayer. MCCAUGHN v. ELECTRIC STORAGE BATTERY COMPANY, 63 F. (2d) 715, decided in the Circuit Court of Appeals for the Third Circuit on January 31, 1933, involved identically the same

issue, and the Findings were, in all respects similar to those in the case at bar. The opinion in that case is in complete harmony with that in the case at bar, and no appeal was taken from that decision in favor of the taxpayer, although the amount involved exceeded the aggregate amount of the five consolidated cases at bar. The opinion in WIER v. MCGRATH, 52 F. (2d) 201, was affirmed by the Circuit Court of Appeals for the Sixth Circuit, 41 F. (2d) 1021, in 1930 prior to the decision of this Court in the UNIVERSAL case, *supra*, and is in complete harmony with the opinion at bar and with the decisions of this Court. The opinion below does not conflict with that of the Circuit Court of Appeals for the Second Circuit in the case of EATON v. AMERICAN CHAIN COMPANY, 63 F. (2d) 783 (1933), and follows, and is in harmony with, the decision of this Court in the UNIVERSAL case, *supra*. That case was vastly different from the one at bar, in that, as found by the Court of Appeals, the articles in question (tire chains) were primarily designed and primarily adapted for use on the automotive vehicles stated in the Revenue Acts; that there was no evidence that they were equally well adapted for other uses; and that the only other use found was on automotive vehicles, and even as to this other use that there was no evidence of equal adaptation.

2. AS TO PETITIONER'S SECOND GROUND, WHICH SHOULD BE RESTATED AS FOLLOWS:

Does Section 424 of the Revenue Act of 1928 oust the jurisdiction of the United States Courts to determine in a suit against the Collector of Internal Revenue whether or not manufacturer's excise taxes under the Revenue Acts of 1921 and 1924 were erroneously and illegally assessed and collected, and vest the determination of such question exclusively in the Commissioner of Internal Revenue?

The fallacy of the Petitioner's contention is apparent when it is realized that the suit at bar is a personal action against the Collector in his individual capacity to determine whether

the taxes were illegally and erroneously collected, and is not an action against the United States. SMIETANKA V. INDIANA STEEL CO., 257 U. S. 1, 66 L. Ed. 99 (1921).

The filing of a Certificate of Probable Cause under the provisions of Section 989 of the Revised Statutes, Act of 3 March, 1863, ch. 76, 12 Stat. L. 741 (Appendix, p. A-2) merely relieves the estate of the Collector against liability for payment of the judgment, and has the effect of converting the judgment into the *nature* of a claim against the United States; FLANDERS V. SHELVE, 105 U. S. 718, which the sovereign will recognize and pay only when, and in the manner, prescribed by Congress.

The section of the Act in question has a perfect application to payment of a judgment against the Collector as distinguished from a right of action to determine the illegality of the collection of the taxes. By virtue of the Regulations of the Treasury No. 74 (1928) Article 1255, 322 C.C.H. 1669 (Appendix, p. A-2), after a judgment is obtained against a Collector, there must be filed with the Commissioner a Claim for Refund, and it is to this refund, or repayment, which Section 424 has perfect application. The proof of this construction lies in the fact that the Section in question is taken solely from the Deficiency Appropriation Acts of February 28, 1927; 44 Stat. Page 1261 (Appendix, p. A-3); December 22, 1927; 45 Stat. 30 Ch. 5 (Appendix, p. A-4); and March 5, 1928, 45 Stat. 169, Ch. 126 (Appendix, p. A-5), all which statutes were for the appropriation of monies, and clearly restricted payment out of these appropriations to refund of taxes by the Commissioner only when the conditions therein provided shall have been satisfied. "Refund" in Section 424 of the Revenue Act of 1928, therefore, clearly means final "repayment," and has no application to a "right of action" to determine the illegality of the collection of taxes. Applying this construction to the case at bar, after the judgment against the Collector has become final the Respondent must file its Claim for Refund for the amount of the judgment, and before final payment by the Commissioner it must comply with the provisions of Section 424 of the Revenue Act of 1928.

This is the construction of the Section adopted by the Circuit Court of Appeals for the Third Circuit in MCCAUGHN

v. ELECTRIC STORAGE BATTERY CO., 63 F. (2d) 715, entered on January 31, 1933, from which no appeal was taken.

The District Court below entered an opinion on December 16, 1929, in the case at bar, dismissing the Petitioner's motion to dismiss upon exactly the ground raised in the Petition for Certiorari, and in that opinion West, *J.*, states that Jones, *J.*, who wrote the opinion in STERLING SPRING CO. v. ROUTZAHN cited on page 11 of the Petition for Certiorari, concurred with him that Section 424 did not oust the jurisdiction of the Court to determine the illegality of the collection of tax. (Appendix, p. A-6.) The decisions of the Court of Claims in the case of JEFFERSON ELECTRIC MFG. CO. v. UNITED STATES, 69 Ct. Cls. 150 (1930), and in BOYLE VALVE COMPANY v. UNITED STATES, 38 F. (2d) 135 (1930), are in exact accord with the Circuit Court of Appeals below.

The Petitioner's contention that the provisions of Section 424 of the Revenue Act of 1928, ousts the jurisdiction of the Courts to determine illegality of collection of the tax is clearly without foundation, because:

First: The Section does not specifically take away the jurisdiction of the Court by repealing the provisions of Section 3226 of the Revised Statutes (Appendix, p. A-11).

Second: If the contention is correct, the Section creates a limitation upon right of action which ends thirty days prior to the date of its passage, and while Congress may shorten the period of limitation, it may do so only upon condition that a reasonable time be given by the new law for the commencement of an action before the bar takes effect; KOSHKONONG v. BURTON, 104 U. S. 668, 26 L. Ed. 886 (1881).

Third: The ousting of the jurisdiction of the Court to determine the illegality of the collection of the tax, and vesting it in the Commissioner of Internal Revenue is clearly unconstitutional in that it violates the guarantee of the due process provision of the Fifth Amendment to the Constitution: TUMEY v. OHIO, 273 U. S. 510, 71 L. Ed. 749 (1927); PHILLIPS v. COMMISSIONER, 283 U. S. 589, 75 L. Ed. 1289 (1931).

Fourth: The Petitioner's contention presents a clear encroachment upon the judicial power of the United States by the Legislative branch of the Government prohibited by Section 1 of Article III of the Constitution: OWENSBORO v. LUCAS, 18 F. (2d) 798 (1927); OHIO VALLEY WATER CO. v. BEN AVON BOROUGH, 253 U. S. 287, 64 L. Ed. 908 (1920); "ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF THE LAW" by JOHN DICKINSON, Vol. II, p. 271.

It is too well settled to admit of argument that the construction of a statute which raises a serious doubt as to its constitutionality will not be considered unless there is no other interpretation open. LUCAS v. ALEXANDER, 279 U. S. 573, 73 L. Ed. 851 (1929); ROUTZAHN v. TYROLER, 36 F. (2d) 208 (1929) (C. C. A. 6th); certiorari denied in 281 U. S. 734, 74 L. Ed. 1149.

It is submitted, therefore, that Section 424 of the Revenue Act of 1928 has a plain meaning which makes it applicable to refund or final payment by the Commissioner after final judgment upon the issue as to the illegality of the collection of the taxes, and that to place upon it the construction contended for by the Petitioner is to strain the plain language used in order, at best, to force an unnatural inference which will violate the constitutional provisions.

Respectfully submitted,

CHARLES C. NORRIS, JR.,
PHILIP DECHERT,
of HEPBURN & NORRIS,
AUGUSTUS B. STOUGHTON,
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APPENDIX.

PHOENIX

TREASURY REGULATIONS 47, revised January 6, 1922.

"ART. 15. *Definition of parts.* A 'part' for an automobile truck, automobile wagon, other automobile, or motor cycle is any article designed or manufactured for the special purpose of being used as or to replace a component part of any such vehicle and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use and which is primarily adapted only for use as a component part of such vehicle.

"The term includes bodies, wheels, engines, springs, axles, radiators etc. When sold separately a side car and a so-called trailer or 'semitrailer' so designed that a portion of the load or the weight thereof is carried or borne by the tractor or 'semitractor' are taxable as 'parts.'

"Mere stock or commercial commodities, such as bolts, nuts, washers, screws, etc., though used as components for such vehicles, are not 'parts' within the meaning of subdivision (3). Articles, however, which ordinarily would be classed as commercial commodities become parts when, because of their design or construction, they are primarily adapted for use as component parts of such vehicles.

"Component parts of articles taxable under this definition are taxable when sold separately if they have reached such stage of manufacture that they are primarily adapted for use as a component part. Blow-out shoes are subject to tax as 'parts' regardless of the fact that they may be made from old casings."

TREASURY REGULATIONS 47 (August 1924).

ART. 16. A "part" for an automobile truck, automobile wagon, or other automobile chassis or body, or motorcycle, is any article designed or manufactured for the special purpose of being used as, or to improve, repair or replace a component part of any such vehicle, or article, and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use, or which is primarily adapted only for use as a component part of such vehicle or article.

An "accessory" for an automobile truck, automobile wagon, or other automobile chassis or body, or motorcycle, is an article designed to be attached to or used in connection with such vehicle or article to add to its utility or ornamentation, or any article which is primarily adapted for use in connection with such vehicle or article whether or not essential to its operation or use.

SECTION 989 REVISED STATUTES, ACT OF 3 MARCH, 1863 CH. 16; 12 STAT. L. 741.

(Sec. 989) When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the Treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government, no execution shall issue against such collector or other officer; but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury.

ARTICLE 1255, REGULATIONS OF TREASURY, NUMBER 74 (1928) 322 CCH. 1669.

"Claims for refund in case of judgment obtained against collector.—(a) Claims for the amount of a judgment against a collector of internal revenue for the recovery of taxes, penalties, or other sums should be made on Form 843 and filed with the Commissioner of Internal Revenue, Washington, D. C. The claimant should state the grounds of his claim under oath, giving the names of all the parties to the suit, the cause of action, the date of its commencement, the date of the judgment, the court in which it was recovered, and its amount. To this affidavit there should be annexed a certified copy of the final judgment in duplicate, a certificate of probable cause, and an itemized bill of the costs paid, receipted by the clerk or other proper officer of the court."

EXCERPT FROM DEFICIENCY APPROPRIATION ACT FEBRUARY 28, 1927, 44 STAT. P. 1261.

An act making appropriations to supply urgent deficiencies in certain appropriations for the fiscal year ending June 30, 1927, and prior fiscal years, and to provide urgent supplemental appropriations for the fiscal year ending June 30, 1927, and for other purposes.

TREASURY DEPARTMENT

BUREAU OF INTERNAL REVENUE.

Refunding taxes illegally collected: For refunding taxes illegally collected under the provisions of sections 3220 and 3689, Revised Statutes, as amended by the Revenue Act of 1918, 1921, 1924 and 1926, including the payment of claims for the fiscal year 1928 and prior years, $175,000,000.00, to remain available until June 30, 1928: Provided, that no part of this appropriation shall be available for paying any claim allowed in excess of $75,000.00 until after the expiration of 60 days from the date upon which a report giving the name of the person to whom the refund is to be made, the amount of the refund, and a summary of the facts and the decision of the Commissioner of Internal Revenue is submitted to the Joint Committee on Internal Revenue Taxation: Provided further, that a report shall be made to Congress of the disbursments hereunder as required by such Acts, including the names of all persons and corporations to whom payments are made together with the amount paid to each: Provided further, that no part of this appropriation shall be available to refund any amount paid by or collected from any manufacturer, producer, or importer in respect of the tax imposed by subdivision (3) of section 600 of the Revenue Act of 1924, or subdivision (3) of section 900 of the Revenue Act of 1921, or of the Revenue Act of 1918, unless the Commissioner of Internal Revenue certifies to the proper disbursing officer that such manufacturer, producer or importer has filed with the

Commissioner, under regulations prescribed by the Commissioner with the approval of the Secretary of the Treasury, a bond in such sum and with such sureties as the Commissioner deems necessary, conditioned upon the immediate repayment to the United States of such portion of the amount refunded as is not distributed by such manufacturer, producer, or importer, within six months after the date of the payment of the refund, to the persons who purchased for purposes of consumption (whether from such manufacturer, producer, importer, or from any other person) the articles in respect of which the refund is made, as evidenced by the affidavits (in such form and containing such statements as the Commissioner may prescribe) of such purchasers, and that such bond, in the case of a claim allowed after the passage of this Act, was filed before the allowance of the claim by the Commissioner.

EXCERPT FROM FIRST DEFICIENCY APPROPRIATION ACT FOR FISCAL YEAR 1928, DECEMBER 22, 1927, 45 STAT. 169.

Provided further, That no part of this appropriation shall be available to refund any amount paid by or collected from any manufacturer, producer, or importer in respect of the tax imposed by subdivision (3) of section 600 of the Revenue Act of 1924, or subdivision (3) of section 900 of the Revenue Act of 1921, or of the Revenue Act of 1918, unless the Commissioner of Internal Revenue certifies to the proper disbursing officer that such manufacturer, producer, or importer has filed with the Commissioner, under regulations prescribed by the Commissioner with the approval of the Secretary of the Treasury, a bond in such sum and with such sureties as the Commissioner deems necessary, conditioned upon the immediate repayment to the United States of such portion of the amount refunded as is not distributed by such manufacturer, producer, or importer, within six months after the date of the payment of the refund, to the persons who purchased for purposes of consumption

(whether from such manufacturer, producer, importer, or from any other person) the articles in respect of which the refund is made, as evidenced by the affidavits (in such form and containing such statements as the Commissioner may prescribe) of such purchasers, and that such bond, in the case of a claim allowed after the passage of this Act, was filed before the allowance of the claim by the Commissioner.

EXCERPT FROM TREASURY AND POST OFFICE APPROPRIATION ACT FOR FISCAL YEAR 1929, MARCH 5, 1928, 45 STAT. 30.

Provided further, That no part of this appropriation shall be available to refund any amount paid by or collected from any manufacturer, producer, or importer in respect of the tax imposed by subdivision (3) of section 600 of the Revenue Act of 1924, or subdivision (3) of section 900 of the Revenue Act of 1921, or of the Revenue Act of 1918, unless the Commissioner of Internal Revenue certifies to the proper disbursing officer that such manufacturer, producer, or importer has filed with the Commissioner, under regulations prescribed by the Commissioner with the approval of the Secretary of the Treasury, a bond in such sum and with such sureties as the Commissioner deems necessary, conditioned upon the immediate repayment to the United States of such portion of the amount refunded as is not distributed by such manufacturer, producer, or importer, within six months after the date of the payment of the refund, to the persons who purchased for purposes of consumption (whether from such manufacturer, producer, importer, or from any other person) the articles in respect of which the refund is made, as evidenced by the affidavits (in such form and containing such statements as the Commissioner may prescribe) of such purchasers, and that such bond, in the case of a claim allowed after the passage of this Act, was filed before the allowance of the claim by the Commissioner.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

Willard Storage Battery Company, Plaintiff.	AT LAW	15761
v.		15762
		15763
C. F. Routzahn, Collector of Internal Revenue, 18th District of Ohio, Defendant.		15764
		15765

OPINION HANDED DOWN DECEMBER 16, 1929, UPON MOTION TO DISMISS.

WEST, *District Judge:*

Until these matters were argued, I was unaware that the question raised by the motions had been previously considered and passed upon by Judge Jones in Sterling Spring Co. *v.* Routzahn, Collector, No. 15574. In conference with him, he expressed the opinion that his memorandum should not be regarded as the law of the district on the question presented in these motions, especially since no review of that case was taken.

Plaintiff sues the collector for the recovery of the manufacturer's excise taxes paid on electric storage batteries and erroneously imposed, as it is claimed, under Secs. 900 (3) of the Revenue Act of 1921, and 600 (3) of the Revenue Act of 1924. The taxes are alleged to have been illegal, because the batteries sold by plaintiff did not constitute parts or accessories for any of the articles enumerated in subdivisions (1) or (2), Sec. 900, Revenue Act of 1921, or in subdivisions (1) or (2), Sec. 600, Revenue Act of 1924, and neither the batteries nor the sales thereof by plaintiff were subject to be taxed. Defendant moves to dismiss on the ground that Sec. 424, Revenue Act of 1928 (Sec. 2424, Tit. 26, U. S. C.) deprives plaintiff of its privilege of refund and of maintaining an action begun subsequent to May 29, 1928; for lack of jurisdiction in the court to review the discretionary power vested in the Commissioner by the provisions of said Sec. 424, and because that section provides an exclusive remedy. Said section reads as follows:

"No refund shall be made of any amount paid or collected from any manufacturer, producer, or importer in respect of the tax imposed by subdivision (3) of Section 600 of the Revenue Act of 1924, or subdivision (3) of section 900 of the Revenue Act of 1921 or of the Revenue Act of 1918, unless either—

(1) Pursuant to a judgment of a court in an action duly begun prior to April 30, 1928; or

(2) It is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of an article subject to tax, or that such amount was not collected, direcly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him; or

(3) The Commissioner certifies to the proper disbursing officer that such manufacturer, producer, or importer has filed with the Commissioner, under regulations prescribed by the Commissioner with the approval of the Secretary, a bond in such sum and with such sureties as the Commissioner deems necessary, conditioned upon the immediate repayment to the United States of such portion of the amount refunded as is not distributed by such manufacturer, producer, or importer, within six months after the date of the payment of the refund, to the persons who purchased for purposes of consumption (whether from such manufacturer, producer, importer, or from any other person) the articles in respect of which the refund is made, as evidenced by the affidavits (in such form and containing such statements as the Commissioner may prescribe) of such purchasers, and that such bond, in the case of a claim allowed after February 28, 1927, was filed before the allowance of the claim by the Commissioner."

Since its enactment, the excise taxes mentioned in the first clause, however illegal or erroneous, can be refunded only in accordance with its provisions.

It is the defendant's contention that a discretionery power is committed to the Commissioner with respect to all the said illegal exactions, except such as are covered by the judgment of

a court mentioned in sub (1); and that, in the exercise thereof, the Commissioner alone must determine whether or not the taxes were lawful, the courts being deprived of all jurisdiction in the premises.

I can not agree with this view, and in my opinion, the language of the statute leads directly to another result. Under sub (2) claims for excessive taxes collected upon sales or leases which were properly subject to a lesser tax, and claims for illegal taxes which either were not collected by the taxpayer from the purchaser or lessee, or if collected, have been returned to him, are dealt with by the Commissioner. But whether his power with respect to such claims or any of them is final, and what if any jurisdiction the courts may have as to such claims, seems to me beside the precise question involved. For, under the averments of the plaintiff's petitions, the claims sued on are of an entirely different character. The taxes were not assessed in an excessive amount upon sales which were taxable, and there is no intimation, either in the petitions or motions that they were not collected from, or were returned to the purchasers of the articles. The distinction between taxes which are excessive in amount and those which are entirely illegal, was clearly in the mind of Congress. This is shown by the Report No. 2 of the Committee on Ways and Means of the House, of December 7, 1927, wherein, at p. 27, after stating that the committee did not believe that, as a general principle, taxes paid upon articles subsequently held to be not taxable should be refunded and thus unjustly enrich the manufacturers, who merely collect the tax from the persons to whom they sold the articles, it is said:

> "However there are some cases where refunds should properly be made. Accordingly section 424 of the new bill provides that judgments of the court should be paid if the action was begun prior to the effective date of the Deficiency Act. It also provides that refunds may be made whenever the taxpayer can establish to the satisfaction of the Commissioner that the amount be paid was excessive (not by reason of the fact that the article was wrongly taxed, but by reason of the fact that the tax was improperly computed)."

The language of the section naming as one condition upon which refunds may be made that "it is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of an article subject to tax," embodies the view of the Committee. It further appears by Conference Report No. 1362, May 25, 1928, that the original bill passed by the House, prohibited refunds except upon conditions, one being: "or (2) unless the amount was an ordinary over-payment of the amount due upon the sale of an article actually subject to the tax."

A tax wholly unauthorized, is not within sub (2), unless it has been passed on to the purchaser or lessee; but falls within subdivision (3) of section 424, and is to be refunded upon the giving of bond conditioned that within six months it will be repaid to the United States, unless in the meantime distributed to the consumers.

The report of the Ways and Means Committee above mentioned, closes with the statement that "in all other cases" (other than those covered by (1) and (2) the taxpayer "must comply with conditions similar to those imposed by the proviso in the deficiency act and give a bond conditioned upon the refund of the tax to the ultimate consumer."

It is quite clear from this report that the Committee which announced that as a general principle, taxes paid upon articles subsequently held not taxable ought not to be refunded so as to unjustly enrich the manufacturer, did not regard the temporary refund under sub (3) of the section as being contrary to this principle, evidently because it is not for the benefit of the manufacturer, but solely for that of the consumer.

The court therefore concludes that as to claims such as those of the plaintiff, there has been no effort by Congress to give the Commissioner final power to determine their legality. When presented, he may reject such a claim because he believes that the taxes imposed were not illegal, or for any other sufficient reason, but his action is not final; and the question of legality then becomes one for the courts to determine. Power finally to decide upon the legality of the exaction must reside somewhere, and where the entire amount of such excise taxes is involved, it rests, since the enactment of section 424, just where it did before—that is, in the courts.

Williamsport Wire Rope Co. v. U. S., 277 U. S. 551, is relied upon by the defendant. It was there held that the power of the Commissioner in determining whether a corporation is entitled under Sections 327 (a) (b) of the Revenue Act of 1919 to have its war and excess profits taxes fixed by a special assessment under Section 326, by a comparison with the taxes of other representative corporations engaged in like business, is discretionary and not subject to review by the courts. But the language of these sections, as well as the many reasons advanced by the Supreme Court why such a construction was necessary to the consistent administration of the law, sufficiently distinguishes that case from these. Whether or not plaintiff's batteries were accessories within the meaning of the revenue acts, is a question to the determination of which the courts are entirely competent. In the view of the court, there is nothing in the language employed in section 424 which confers discretionary power upon the Commissioner to finally decide upon the legality or illegality of the taxes imposed upon the plaintiff, nor is any reason apparent why such final jurisdiction should have been conferred.

The question now before the court is the plaintiff's right to bring and maintain these actions. They are against the Collector and seek personal judgments only. Whether or not they finally result in collectible claims against him or the United States, the court is bound to entertain them, unless prevented by section 424. It can not now be known with certainty that any judgments recovered will be paid by the United States. Smietanka v. U. S., 257 U. S. 1, 4. If no certificate of probable cause issues by the court and the United States does not become liable, nothing in section 424 relating to refunds from the U. S. Treasury can possibly affect the controversy between the plaintiff and the defendant as it will then stand. That section, whatever power it may confer upon the Commissioner, and take from the courts with respect to the determination of facts as the basis of refunds, would not seem to affect the jurisdiction to maintain an action against a collector for recovery of any excise taxes, even though of a class covered by its provisions.

But if it were now certain that a certificate would issue,

the court is of opinion that the section does not cut down the court's jurisdiction, with respect to the particular claims involved in these cases.

If illegality of these taxes is established by judgments, refunds will not be made "pursuant to" such judgments, within the meaning of Sec. 424, sub (1); but pursuant to sub (3), and will be conditional and for the benefit of consumers.

If the petitions may be entertained, it is no objection that they were filed subsequently to April 30 or May 29, 1928.

The motions will be overruled.

S. H. WEST,
Judge.

SECTION 3226 R. S. AS AMENDED BY SECTION 1113 REVENUE ACT, 1926.

No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail.

(*b*) This section shall not affect any proceeding in court instituted prior to the enactment of the Revenue Act of 1924.

REVENUE ACT OF 1921. 42 ST. L. 227. TITLE IX.

Sec. 900. That from and after January 1, 1922, there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentage of the price for which so sold or leased:

(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;

(2) Other automobiles and motorcycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;

(3) Tires, inner tubes, parts, or accessories, for any of the articles enumerated in sub-division (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in sub-division (1) or (2), 5 per centum.

Act passed November 23, 1921.
Effective November 23, 1921.

REVENUE ACT OF 1924. 43 ST. L. 253. TITLE VI.

Sec. 600. On and after the expiration of thirty days after the enactment of this act there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentage of the price for which so sold or leased:

(1) Automobile truck chassis and automobile wagon chassis sold or leased for an amount in excess of $1,000. and automobile truck bodies and automobile wagon bodies sold or leased for an amount in excess of $200. (including in both cases tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the

sale thereof), 3 per centum. A sale or lease of an automobile truck or of an automobile wagon shall, for the purpose of this sub-division, be considered to be a sale of the chassis and of the body.

(2) Other automobile chassis and bodies and motorcycles (including tires, inner tubes, parts and accessories therefor sold on or in connection therewith or with the sale thereof) except tractors, 5 per centum. A sale or lease of an automobile shall, for the purpose of this subdivision, be considered to be a sale of the chassis and of the body.

(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in sub-division (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in sub-division (1) or (2), 2½ per centum. This sub-division shall not apply to chassis or bodies for automobile trucks, automobile wagons or other automobiles.

Act passed June 2, 1924.
Act effective July 3, 1924.

SECTION 424, REVENUE ACT OF 1928.

(*a*) No refund shall be made of any amount paid by or collected from any manufacturer, producer, or importer in respect of the tax imposed by subdivision (3) of section 600 of the Revenue Act of 1924, or subdivision (3) of section 900 of the Revenue Act of 1921 or of the Revenue Act of 1918, unless either—

(1) Pursuant to a judgment of a court in an action duly begun prior to April 30, 1928; or

(2) It is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of an article subject to tax, or that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him; or

(3) The Commissioner certifies to the proper disbursing officer that such manufacturer, producer, or importer has filed

with the Commissioner, under regulations prescribed by the Commissioner with the approval of the Secretary, a bond in such sum and with such sureties as the Commissioner deems necessary, conditioned upon the immediate repayment to the United States of such portion of the amount refunded as is not distributed by such manufacturer, producer, or importer within six months after the date of the payment of the refund, to the persons who purchased for purposes of consumption (whether from such manufacturer, producer, importer, or from any other person) the articles in respect of which the refund is made, as evidenced by the affidavits (in such form and containing such statements as the Commissioner may prescribe) of such purchasers, and that such bond, in the case of a claim allowed after February 28, 1927, was filed before the allowance of the claim by the Commissioner.

(*b*) The second proviso under the heading "Internal Revenue" in section 1 of the First Deficiency Act, fiscal year 1928, and the second proviso of the fourth paragraph under the heading "Internal Revenue Service" in section 1 of the Treasury and Post Office Appropriation Act for the fiscal year 1929, are repealed.

Act passed May 29, 1928.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933. No. 329.

C. F. ROUTZAHN, COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES FOR THE EIGHTEENTH DISTRICT OF OHIO, Petitioner,

v.

WILLARD STORAGE BATTERY COMPANY, a corporation, Respondent.

BRIEF FOR THE RESPONDENT.

PHILIP DECHERT,
CHARLES C. NORRIS, JR.,
OF HEPBURN & NORRIS.
AUGUSTUS B. STOUGHTON,
Counsel for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933. No. 329.

C. F. Routzahn, Collector of Internal Revenue of the United States for the Eighteenth District of Ohio, Petitioner,

v.

Willard Storage Battery Company, a Corporation, Respondent.

BRIEF FOR THE RESPONDENT.

OPINIONS BELOW.

The opinion of the District Court for the Northern District of Ohio (R. 32) is not reported.[1] The opinion of the Circuit Court of Appeals (R. 154) is reported in 65 F. (2d) 89.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered May 9, 1933 (R. 154). Jurisdiction is

[1] An opinion overruling motions to dismiss, not in the record, is not officially reported but may be found in 8 Am. Fed. Tax Reports, 11274. For convenience it is reprinted in the appendix to this brief, p. A-11.

invoked by Petitioner under Section 240 (a) of the Judicial Code.

QUESTIONS PRESENTED.

Stated in Brief for the Petitioner.

STATUTES AND REGULATIONS INVOLVED.

Section 900, Revenue Act of 1921, 42 St. L. 227 (Appendix, p. A-1). Section 600, Revenue Act of 1924, 43 St. L. 253 (Appendix, p. A-1). Section 424, Revenue Act of 1928 (Appendix, p. A-3). Treasury Regulations 47, Art. 15, revised January, 1922 (Appendix, p. A-8). Treasury Regulations 47, Art. 16, revised August, 1924 (Appendix, p. A-9). Treasury Regulations 74, Art. 1255, 1928 (Appendix, p. A-10). Section 3226 of the revised Statutes (Appendix, p. A-5).

STATEMENT OF THE CASE.

In addition to the facts set forth in the Statement of the Case in Petitioner's Brief, the following proceedings in the case prior to the commencement of the five actions at law are material to the consideration of the question presented under Section 424 of the Revenue Act of 1928.

On October 5, 1926, Respondent filed its Claims for Refund of manufacturers' excise tax paid on electric storage batteries (R. 5, 14, 23, 90, 97, 105,

111, 118, 126, 132, 138) for each year during the taxable periods from January 1922 to February 1926, inclusive, in the amounts of $295,344.49, $243,047.28, $188,448.16, $175,875.19 and $24,971.20, respectively.

On October 29, 1926, Respondent filed its amended Claims for Refund, No. 700, No. 701, No. 702, No. 703, No. 704 (R. 7, 14, 23, 92, 97, 106, 112, 120, 126, 131, 139) of manufacturer's excise tax so paid on electric storage batteries for each year during the taxable periods from January 1922 to February 1926, inclusive, in the amounts of $295,049.71, $249,275.32, $189,853.88, $173,934.45, and $41,764.37, respectively, which were duly rejected by the Commissioner of Internal Revenue on June 21, 1927 (R. 9, 14, 23, 93, 97, 108, 112, 122, 126, 135, 139).

The date of enactment of the Revenue Act of 1928 was May 29, 1928.

These five actions at law were instituted in the District Court of the United States for the Northern District of Ohio, Eastern Division, on May 31, 1929, against the Collector of Internal Revenue.

SUMMARY OF ARGUMENT.

I.

(1) Section 424 of the Revenue Act of 1928 is an administrative provision which applies to final repayment of taxes adjudged to have been illegally assessed and collected, rather than a prerequisite to suit and therefore a limitation upon a right of action as Petitioner claims; (2) that if the Petitioner's

contention is correct then the Section is unconstitutional; and (3) that whether it is an administrative provision or a limitation upon a right of action it is unconstitutional because it destroys a pre-existing right and creates the effect of imposing a retrospective tax liability where none existed prior to the passage of the Act.

II

(1) That in determining whether an article is a "part" for an automobile under the Revenue Acts of 1921 and 1924, the fact of chief or principal use has no application where the article both before and after the passage of the Act was and is equally adapted for a great many other uses; was in wide, common and general use for a great many other purposes, such other uses being not incidental to the use on automobiles, and the article having been found not to be primarily adapted for use on automobiles; (2) that the Revenue Act of 1932, imposing an excise tax on storage batteries suitable for use on automobiles, is to be construed as imposing a new tax upon storage batteries which were not taxable under the Revenue Acts of 1921 and 1924, and not as evidencing an intention under the earlier Acts to make them taxable; and (3) the Court has no right in construing a tax Act to inquire into the intention of Congress, but is bound by the plain meaning in their ordinary sense of the words used, and must resolve any doubt in favor of the taxpayer.

ARGUMENT.

I.

1. AS TO PETITIONER'S CONTENTION THAT SECTION 424 CONSTITUTES A LIMITATION UPON A RIGHT OF ACTION.

The case at bar differs radically from the case of Jefferson Electric Manufacturing Company in that (*a*) in the latter case the suit is against the United States, while the suit at bar is against the Collector, and (*b*) the claims for refund filed by Respondent in accordance with Section 3226 of the Revised Statutes (A 5), were rejected on June 21, 1927 (R. 23), almost one year prior to the passage of the Revenue Act of 1928, and therefore at the date of the passage of that Act, the Respondent had a little over one year within which to bring its suit before the running of the Statute of Limitations; and (*c*) in this case the question of whether or not the taxes had been collected from the purchaser, or whether or not the Respondent had filed the bond provided in Section 424 was not raised.

The Petitioner's contention as set forth in his brief in the case at bar and in his brief in the Jefferson case is that the provisions of Section 424 of the Revenue Act of 1928 constitute a limitation upon a right of action to recover taxes illegally assessed and collected, and under color of this contention maintains:

> 1. That the making of refunds under the Section was vested in the exclusive discretion of the

Commissioner of Internal Revenue without right of review in the Courts.

2. That the respondent, in a suit against the Collector to recover taxes illegally assessed and collected, was under the necessity of proving that the amount of the taxes had not been collected from the purchaser, or if so collected, had been repaid to him, or that the bond required by the Section had been filed.

To support his construction of Section 424 involves a distortion of the language used in order, at best, to render it susceptible of an inference which cannot be drawn from the plain, unambiguous and ordinary meaning of the words used. It is submitted that it is a fundamental rule in the construction of Statutes that their words are presumed to be used in their ordinary sense, and with the meaning commonly attributable to them:

DE GANAY v. LEDERER, 250 U. S. 376; 63 L. Ed. 1042 (1919);

ENDLICH'S INTERPRETATION OF STATUTES, page 4.

It is equally well settled that in every case of doubt, every reasonable inference, every doubt, and every statutory ambiguity must be resolved in favor of the taxpayer and against the Government:

GOULD v. GOULD, 245 U. S. 151, 62 L. Ed. 211 (1917);

UNITED STATES v. MERRIAM, 263 U. S. 179, 68 L. Ed. 240 (1923).

The Petitioner's contention that the Section vests in the Commissioner of Internal Revenue the exclusive determination as to the making of refund without right of review by the Courts is so palpably wrong as to require but little discussion. This construction of the Section would be such an encroachment by the Legislative branch of the Government upon the Judicial power as to render it clearly a violation of Section 1 of Article III of the Constitution:

OHIO VALLEY WATER CO. v. BEN AVON BOROUGH, 253 U. S. 287; 64 L. Ed. 908 (1920);

OWENSBORO v. LUCAS, 18 F. (2d) 798 (1927);

ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF THE LAW BY JOHN DICKINSON, Vol. II, p. 271.

Furthermore, such a construction obviously violates the guarantee of the due process clause of the Fifth Amendment to the Constitution:

TUMEY v. OHIO, 273 U. S. 510; 71 L. Ed. 749 (1927);

PHILLIPS v. COMMISSIONER, 283 U. S. 589; 75 L. Ed. 1289 (1931).

The Petitioner further contends that if the foregoing construction which he places upon Section 424 is wrong, then that the Court had no jurisdiction to entertain the suit against the Collector because Respondent did not plead and prove the fact that the tax illegally collected had not been paid by the

purchaser, or, if paid, had not been returned to him, or that the Commissioner had certified to the proper disbursing officer that the bond described in the Section had been filed. This construction is invoked by reason of the contention that by Section 424 Congress meant to prohibit refunds of taxes illegally collected, if, as the Petitioner phrases it, the plaintiff, although not liable for the tax, "did not bear the economic burden of the tax." This construction is, at best, an inference to be drawn from the language of the Section, which can only be reached by imposing a strain upon the words used, and is, of course, wholly inconsistent with his first suggested construction. He argues that the Court might render judgment against the Collector in the case at bar (against the United States in the Jefferson case) and that the judgment of the Court might be nullified (that is, satisfaction of the judgment by payment might be refused), by the administrative determination of the Commissioner that an amount equal to the taxes had been collected from the purchaser. He states that in such event no case or controversy in the constitutional sense with reference to the exercise of judicial power is presented, and therefore, the Court is without jurisdiction. The Petitioner relies upon the case of GORDON v. UNITED STATES, 2 Wall, 561, but that case was quite different. The Act of Congress of 1863, the construction of which was before the Court, endeavored to transform the Court of Claims, which it had created in 1855 merely to investigate claims against

the United States, into a court in the judicial sense of the term, but because it provided that no final judgment should be paid unless the Secretary of the Treasury first "estimated" for an appropriation, this Court held that no judicial power had been conferred upon it, and that its judgments were merely opinions. The case at bar, however, is in a constitutional Court, as distinguished from a legislative Court, and is against the Collector, and not against the United States, and in exercising the judicial function it is not necessary, in order to constitute a judicial judgment, that there should be power to issue formal execution to carry the judgment into effect:

FIDELITY NATIONAL BANK v. SWOPE, 274 U. S. 123; 71 L. Ed. 959 (1927);

OLD COLONY TRUST CO. v. COMMISSIONER, 279 U. S. 716; 73 L. Ed. 918 (1929);

NASHVILLE v. WALLACE, 288 U. S. 249; 77 L. Ed. 444 (1933).

No process can issue against the United States upon judgments of the Court of Claims, and yet actions in that Court are "cases" or "controversies" in the constitutional sense:

UNITED STATES v. JONES, 119 U. S. 477; 30 L. Ed. 440 (1886);

NASHVILLE C. & ST. L. R. Co. v. WALLACE, 288 U. S. 249; 77 L. Ed. 448 (1933).

In the other three cases, namely *In re* SANBORN, 148 U. S. 222, 37 L. Ed. 429 (1893), HAYBURN'S CASE, 2 Dall. 409, UNITED STATES v. FERREIRA, 13 How. 40, there was no suit or controversy in the lower Court. In one case, the Court below by consent rendered an opinion for the guidance of an administrative officer of the Government, and in the other two cases, the Judges who rendered opinions made it perfectly clear that they were not acting as Judges, nor was the Court acting as a Court, but that they assumed the burden of ascertaining certain facts which had been imposed by Congress as commissioners and not as Courts.

The Petitioner relies upon two decisions of this Court to sustain his construction that Section 424 creates a limitation upon a right of action, but neither of them can be so construed. In one of them, WILLIAMSPORT WIRE ROPE COMPANY v. UNITED STATES, 277 U. S. 551; 72 L. Ed. 985 (1928), the provision of the appropriate Revenue Act was in relief of the taxpayer, and there was no question left to the determination of the Commissioner as to the legality of the tax. The sole question left to him was to ascertain from tax returns from other taxpayers in his possession, in a business similar to that of the taxpayer, whether the taxes properly assessed were proportionately grossly greater than those properly assessed against his competitors. This was information solely in the knowledge of the Commisisoner,

and because the Act in question was a relief Act, as distinguished from an Act which attempted to take away a right, it was held that the delegation to the Commissioner to ascertain facts which were in his exclusive knowledge was proper and did not encroach upon the judicial power of the United States, and the administrative delegation to the Commissioner was a proper one. The other case cited by the Petitioner, GRAHAM v. GOODCELL, 282 U. S. 409; 75 L. Ed. 415, (1931), does not support his contention. In that case this Court decided that Congress had power to place a limitation upon a right of action solely in the course of correcting an administrative mistake, where the substantive question of the validity of the taxes was not, nor could not, be in question, but reiterated the general rule that a right of action could not be taken away by a Statute which retroactively imposed a liability where none existed prior to the enactment. The Court said:

> "It is apparent, as the result of the decisions, that a distinction is made between a bare attempt of the legislature retroactively to create liabilities for transactions which, fully consummated in the past, are deemed to leave no ground for legislative intervention, and the case of a curative statute aptly designed to remedy mistakes and defects in the administration of government where the remedy can be applied without injustice. Where the asserted vested right, not being linked to any substantial equity, arises from the mistake of officers purporting

to administer the law in the name of the government, the legislature is not prevented from curing the defect in administration simply because the effect may be to destroy causes of action which would otherwise exist. * * *

"If the Congress did not have the authority to deal by a curative statute with the taxpayers' asserted substantive right, in the circumstances described, it could not be concluded that the Congress could accomplish the same result by denying to the taxpayers all remedy both as against the United States and also as against the one who committed the wrong."

Furthermore if the Petitioner's contention is correct,—that the determination of the Commissioner as to the collection of the tax was a prerequisite to the bringing of suit against the Collector,—then it might well happen that even if the Commissioner should determine that the taxes had not been collected from the purchaser, the Respondent's right of action might be barred by the running of the Statute of Limitations for the reason that his claim was rejected by the Commissioner on June 21, 1927, and he then had two years within which to bring suit against the Collector in accordance with the provisions of Section 3226 of the Revised Statutes (A-5), and if, when the Revenue Act of 1928 was passed on May 29, 1928, he was compelled to file a new Claim for Refund,—which is the only method known to the Respondent to invoke the determination of such a question,—then more than sixty per cent of his

claim would have been barred by the Statute, which prohibits the filing of a Claim for the refund of taxes paid more than four years prior to the filing of the Claim.

If, therefore, the effect of the statute is to create a new limitation upon actions without affording a reasonable time for bringing the action before the bar takes effect, this would amount to a denial of justice and make the act unconstitutional. The section did prevent the refund of judgments of the court unless the suit had been instituted more than thirty days prior to its passage, because the date of the passage of the Revenue Act of 1928 was May 29, 1928, and the limitation for the bringing of actions was April 30, 1928.

KOSHKONONG v. BURTON, 104 U. S. 668, 26 L. Ed. 886 (1881).

NOTE—8 AM. & ENG. ANN. CAS. p. 525.

The Petitioner attempts to answer this question by pointing out that the same provisions as in Section 424 of the Revenue Act of 1928 had previously appeared in the Deficiency Appropriation Acts of February 28, 1927, (44 Stat. p. 1261), of December 22, 1927, (45 Stat. 30), and of March 5, 1928, (45 Stat. 169). All of these Acts were for the appropriation of moneys and no attempt was made in them to deal with a right of action. If the provisions of Section 424 are construed as a limitation upon a right of bringing action, the origin of this limitation is clearly in Section 424 of the Revenue Act of 1928.

The limitations in the Appropriation Acts referred to dealt only with the disposition of the moneys appropriated therein, and cannot create a limitation upon a substantive right.

No matter what interpretation is given to Section 424, and especially as an answer to Petitioner's contention that submission to the Commissioner of the question as to whether or not the taxes had been paid by the purchaser is a prerequisite to suit, Respondent points out that the Commissioner, under the decision of this Court, is bound to find that the taxes were not paid by the purchaser: LASH'S PRODUCTS CO. v. UNITED STATES, 278 U. S. 175; 73 L. Ed. 251 (1929).

2. RESPONDENT CONTENDS THAT SECTION 424 IS AN ADMINISTRATIVE PROVISION WHICH APPLIES ONLY TO FINAL REPAYMENT.

The Respondent's contention is that Section 424 is an administrative provision and applies solely to "repayment" and not to a right of action. This is the ordinary meaning of "refund" and, given this meaning, it has perfect application to final repayment when a Claim for Refund upon the judgment is presented to the Commissioner. This is the interpretation which has been placed upon the Section by every Court in which the question has been raised, excepting in the District Court of Texas in the case of TWENTIETH CENTURY MANUFACTURING CO. v.

HOPKINS (unreported), cited in Petitioner's brief in the Jefferson case, and by thus translating the words used into their plan, unambiguous and obvious meaning, no necessity arises to resort to a distortion in order at best to raise an inference as to an intent of Congress which does not appear from the phraseology.

Remembering that the suit at bar is against the Collector to recover taxes illegally assessed and collected, it may be of interest to note the procedure which must be followed with reference to the correct application of Section 424. At the inception of the suit the United States has no immediate interest in it, except that by Section 3226 of the Revised Statutes, as a prerequisite to suit, the plaintiff must have filed with the Commissioner a Claim for Refund apprising him of the grounds for the claim. If the Commissioner rejects it, or if he does not act for six months, a suit must be brought within two years from the date of rejection, or from the expiration of the period of six months. At the conclusion of the trial the Court may, if the facts warrant, make a Certificate of Probable Cause, which has the effect of converting the judgment against the Collector into the nature of a claim against the United States: FLANDERS v. SEELYE, 105 U. S. 718 (1881). When the judgment has become final the plaintiff must present to the Commissioner a "Claim for Refund" upon the judgment in accordance with TREASURY REGULATIONS No. 74 (1928) ARTICLE 1255 (Appendix, p. A-10). It is to this "refund" which Section 424 has perfect applica-

tion. It is clear, therefore, that Congress intended this provision to apply as an administrative act after the judgment as to illegality of collection had been made. This was the view taken by the United States Circuit Court of Appeals for the Third Circuit in McCaughn v. Electric Storage Battery Company, 63 Fed. (2d) 715 (1933), from which no appeal was taken by the government, and is apparently the view of the Treasury Department as expressed by the Petitioner in his brief which states that payment of the judgment in that case has been withheld and the taxpayer has been asked to satisfy the Commissioner that an amount equal to the taxes was not paid by the purchaser.

3. SECTION 424 IS UNCONSTITUTIONAL IN ITS ENTIRETY, NO MATTER WHETHER CONSTRUED AS A LIMITATION UPON A RIGHT OF ACTION OR AS AN ADMINISTRATIVE PROVISION.

Whether Section 424 is construed as a limitation upon a right of action or as an administrative provision, the inevitable result is that it deprives Respondent of his right to recover taxes which were illegally assesed and collected from him. It will be borne in mind that at the time of the passage of the Revenue Act of 1928 the Respondent had a right at common law and by statute to sue the Collector personally for his illegal acts in requiring payment of a tax upon an article which was not subject to tax;

SAGE v. UNITED STATES, 250 U. S. 33; 63 L. Ed. 828 (1919);

SMIETANKA v. INDIANA STEEL COMPANY, 257 U. S. 1; 66 L. Ed. 99 (1921).

By the filing of the Certificate of Probable Cause, the Collector is relieved of personal liability for the payment of the judgment, and the judgment is converted into the nature of a claim against the United States;

FLANDERS v. SEELYE, *supra,* and

SEC. 989, REVISED STATUTES (Appendix, page A-4).

Thus the right of a private party to recover money due to him from the Collector is taken away and the right of presenting a claim on the judgment to the United States for payment has been substituted therefor. Congress, however, by the enactment of Section 424, now attempts to take away all existing remedies for the enforcement of the right to recover money due when the Act was passed. This attempt is clearly unconstitutional and void under the Fifth Amendment to the Constitution in that it deprives a private party of all existing remedies for the enforcement of an existing right which the Congress has no power to destroy;

UNITED STATES v. KLEIN, 13 Wall. 128; 80 U. S. 128 (1871);

POINDEXTER v. GREENHOW, 114 U. S. 270; 29 L. Ed. 185 (1844);

DEN v. HOBOKEN LAND AND IMPROVEMENT COMPANY, 59 U. S. 286; 15 L. Ed. 372 (1856) *(obiter dicta)*;

ETTOR v. TACOMA, 228 U. S. 148; 57 L. Ed. 773 (1912);

PACIFIC MAIL S. S. Co. v. JOLIFFE, 2 Wall. 450; 17 L. Ed. 805 (1864);

FORBES PIONEER BOAT LINE v. BOARD OF COMMISSIONERS OF EVERGLADES DRAINAGE DISTRICT, 258 U. S. 338; 66 L. Ed. 647 (1921);

BRINKERHOFF-FARIS TRUST & SAVINGS COMPANY v. HILL, 281 U. S. 673; 74 L. Ed. 1107 (1929);

GRAHAM v. GOODCELL, 282 U. S. 409; 75 L. Ed. 415 (1931).

The effect of the Section 424 in depriving the Respondent of its remedy both as against the United States and as against the Collector who committed the wrong, is to impose upon the Respondent a heretofore non-existing tax liability. As the Petitioner phrases it, Congress evinced an intent to prevent the refund of these illegal taxes unless Respondent had "borne the economic burden of them," which is tantamount to saying that although the articles were not taxable in the first instance, yet if a like amount of money was collected from a purchaser, the tax liability is now imposed. The creation of this kind of retroactive liability is clearly a deprivation of property without due process, and is void under the Fifth Amendment to the Constitution;

UNITED STATES v. KLEIN, *supra;*
DANZER & CO., INC. v. GULF & S. I. R. Co., 268 U. S. 633; 69 L. Ed. 1126 (1924)

and see cases cited above.

This whole question has been so recently before this Court in the case of GRAHAM v. GOODCELL, *supra,* that the Respondent hesitates to further extend the argument. In that case the present Chief Justice, on page 426 of the Opinion, reiterated the general rule "that it is not consistent with due process to take away from a private party a right to recover the amount that is due when the Act is passed." The Court then points out that the exceptions to this rule are confined to those cases where the Congress corrected an administrative mistake, but at the same time did not retroactively create a liability where none existed before.

In the case at bar, whether or not an amount equal to the tax was "passed on" to the purchaser, no liability for the tax existed prior to the enactment of Section 424. In GRAHAM v. GOODCELL, *supra,* the taxes in question were valid from the beginning but their collection was illegal, because of the bar of the Statute of Limitations. Collection was enforced however, because of an administrative mistake and Congress in recognizing the right to recover these taxes provided that no recovery should be had where the taxpayer himself contributed to the running of the Statute of Limitations by obtaining a stay upon a claim in abatement. In the case at bar, there was

no defect in the administration of the law; the taxes were wholly illegal from the beginning; and there were no other facts to bring the case within the exception to the general rule as stated in GRAHAM v. GOODCELL, *supra,* and therefore it is clear that under this rule, Section 424 violates the constitutional provision in that it attempts retroactively to create a liability in relation to a transaction as to which no liability had previously attached. See FORBES PIONEER BOAT LINE v. BOARD OF COMMISSIONERS OF EVERGLADES DRAINAGE DISTRICT, *supra.*

If Congress did not have power to create retroactively a liability where no liability existed before the passage of the Act, as said in GRAHAM v. GOODCELL, *supra,* "it could not be concluded that Congress could accomplish the same result by denying to the taxpayers all remedy both as against the United States and also as against the one who committed the wrong." See the particularly apposite case of UNITED STATES v. KLEIN, *supra.*

The Petitioner's argument that if the manufacturer did "pass on" the excise tax to the purchaser, then the manufacturer, in maintaining his right to recover the amount of the tax, has no beneficial interest in it, is a specious argument, because as a matter of fact the tax is never passed on. Whatever the purchaser pays is the purchase price which he is willing to pay for the goods, while the excise tax is the manufacturer's obligation based upon that purchase price. This being so, the Commissioner, under the decisions

of this Court, must find that the taxes were not passed on to the purchaser.

LASH'S PRODUCTS COMPANY v. UNITED STATES, 278 U. S. 175; 73 L. Ed. 251 (1929).

Section 424, in attempting to take away existing rights, and to create retroactive liability, is so arbitrary and capricious as to amount to confiscation, and thus is undoubtedly void under the Fifth Amendment;

NICHOLS v. COOLIDGE, 274 U. S. 531; 71 L. Ed. 1184 (1927).

II.

1. AS TO PETITIONER'S CONTENTION THAT CHIEF USE IS DETERMINATIVE OF THE QUESTION AS TO WHETHER OR NOT THE RESPONDENT'S BATTERIES WERE PRIMARILY ADAPTED FOR USE IN AUTOMOBILES.

The Petitioner's argument upon this contention is that under the definition of "parts" laid down by the Treasury Department and by this Court, chief use of such article is determinative of the fact that the article was or was not primarily adapted for a particular use. This Court has denied this contention, and as will be demonstrated later in this brief, the principle has no application to the case at bar because the chief or principal use of the battery was not on or in connection with automobiles.

This Court in the case of UNIVERSAL BATTERY COM-

PANY V. UNITED STATES, 281 U. S. 580; 74 L. Ed. 1051 (1930), in clear and unmistakable language defined what was or was not a "part" under the pertinent Revenue Acts. In so doing, it adopted and approved the definition of the Treasury Department in its regulations as to what did or did not constitute "parts" under the Revenue Acts of 1921 and 1924, and at the same time it reiterated the earlier decisions of this Court upon which the definition of the Treasury Department was based. In his citation of it, the Petitioner has omitted a necessary part of this Court's decision in the Universal Battery case. What the Court said was:

> "The administrative regulations issued under Section 900 uniformly have construed the term 'part' in that Section as meaning any article designed or manufactured for the special purpose of being used as or to replace a component part of such vehicle, and which by reason of some characteristic is not such a commercial commodity as ordinarily would be sold for general use, but is primarily adapted for use as a component part of such vehicle. The regulations also have construed the term 'accessory' as meaning any article designed to be used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted to such use whether or not essential to the operation of the vehicle.
>
> "This construction of those terms has been adhered to in the Internal Revenue Bureau for about ten years and it ought not to be disturbed now unless it be plainly wrong. We think it is

not so, but is an admissible construction. Certainly it would be unreasonable to hold that articles equally adapted to a variety of uses and commonly put to such uses, one of which is use in motor vehicles, must be classified as parts or accessories for such vehicles.

"And it would be also unreasonable to hold that articles can be so classfied only where they are adapted solely for use in motor vehicles and are exclusively so used—Magone *v.* Wiederer, 159 U. S. 555, 559—We think the view taken in the administrative regulations is reasonable and should be upheld. It is that articles primarily adapted for use in motor vehicles are to be regarded as parts or accessories of such vehicles even though there has been some other use of the articles for which they are not so well adapted."

The definition of "parts" of the Treasury Department which this Court approved in the Universal Battery case appears in its Regulations No. 47 promulgated on May 1, 1919 (Appendix p. A-6) under Section 900 (c) of the Revenue Act of 1918 which levied an excise tax in identically the same language as in the Revenue Acts of 1921 and 1924. This definition is as follows:

"Art. 15. Definition of parts. A 'part' for an automobile truck, automobile wagon, other automobile, or motorcycle is any article *designed* or *manufactured* for the *special purpose* of being used as or to replace a component part of any such vehicle, and which by reason of some *peculiar characteristic* is *not such a commercial commodity as would ordinarily be sold for general*

> *use,* and which is primarily adaptable *only* for use as a component part of such vehicle." (Italics ours.)

Identically the same language was used in its Regulations No. 47, revised on December 27, 1920 (Appendix, p. A-7); its Regulations No. 47, revised on January 6, 1922, after the passage of the Revenue Act of 1921, (Appendix, p. A-8); and in its Regulations No. 47, revised in August, 1924, after the passage of the Revenue Act of 1924, (Appendix, p. A-9).

This Court in the Universal Battery case, *supra,* cited the case of MAGONE v. WIEDERER, 159 U. S. 555; 40 L. Ed. 258 (1895), upon which the Treasury Department obviously framed its definition of "parts." This Court said in that case:

> "If they (pieces of square, oblong or round glass with beveled edges) are articles, all, or one or more, as the case may be, which have no distinguishing characteristics, which are just as applicable for use in fancy boxes or in coach lamps as they are for clocks, just as applicable to the one use as to the other, then it would be entirely proper to say that they have no distinguishing characteristics as parts of clocks. They might be used for one purpose just as well as for another. And if you find as to those articles, or any of them, that they have several uses to which they are perfectly applicable, then as to those articles your verdict should be for the defendant." (Meaning that they would not be "parts" of clocks.)

The case of Magone *v.* Wiederer, *supra,* in turn cited the case of MAGONE v. HELLER, 150 U. S. 70; 37 L. Ed. 1001 (1893), which it had decided two years earlier, in which it was held, in effect, that if an article was widely, generally and commonly used for other purposes, it could not be held to be a "part" for an article for another use, even though in the majority of cases it was so used.

This Court has clearly defined a "part" under the pertinent Revenue Acts, and has again announced that if an article is equally adapted to a variety of uses and commonly put to such uses, it can not be a "part" for one of those uses, saying:

> "Certainly it would be unreasonable to hold that articles equally adapted to a variety of uses and commonly put to such uses, one of which is use in motor vehicles, must be classified as parts or accessories for such vehicles."

The Treasury Department itself had no quarrel with this definition, for as early as 1923 it applied its definition in the case of a spark plug and held that a spark plug was commonly, widely and generally used for a great many other purposes as well as in automobiles, and for that reason could not be held to be primarily adapted for use on the automobile. Exactly the same principle applies to storage batteries. For the convenience of the Court, the decision of the Treasury Department concerning spark plugs is set forth in the appendix to this brief on page A-19.

The District Court below made the following find-

ings which, as stated in the opinion of the Circuit Court of Appeals below, were supported by "a wealth of evidence," none of which was controverted:

> "That storage batteries, prior to their use on automobiles, were commercial commodities widely, generally and commonly sold for many different uses. (Fact Number 10, R-39.)
>
> "That the first storage batteries which were purchased for use on automobiles were the same in all essential respects as the batteries which had been commonly and widely used for a number of years for many other purposes. (Fact Number 11, R-39.)
>
> "That the automobile manufacturer adjusted the space in the automobile to fit the storage battery and the storage battery was not designed specially for use on the automobile. (Fact Number 12, R-39.)
>
> "That the parts of the electric storage batteries upon which the taxes in suit were paid were much the same as the parts of the storage batteries manufactured by the predecessors of the Plaintiff in 1895 or 1899, the only changes being those naturally due to the refinement in art of manufacture during that period and to competition in price. None of these refinements made the batteries peculiarly adaptable for use only on automobiles, but they continued to be equally adaptable for use on any device where the duty requirements were the same. (Fact Number 13, R-39, 40.)
>
> "That the storage batteries manufactured by the Plaintiff and upon which the taxes in suit were paid were commercial commodities which

were commonly, generally and widely manufactured and sold for a great many different purposes. There was no peculiar characteristic of these batteries which rendered them not such a commercial article as would ordinarily be sold for general use for a great many different purposes. (Fact Number 14, R-40.)

"That the uses of said electric storage batteries, other than the use on automobiles, were not incidental to the use on automobiles. (Fact Number 15, R-40.)

"That the storage batteries manufactured by the Plaintiff, and upon which the taxes in suit were paid, were not peculiarly adaptable only for automobiles, but were equally well adaptable for use in stationary engines, marine engines, tractors, radio, and for a great many other purposes where the duty required was the same, and were so used. Nor were they primarily adaptable for use only on automobiles. They were interchangeable for use in connection with automobiles or for use in connection with a great many other devices where the duty requirements were the same. (Fact Number 16, R-40.)

"That the storage batteries manufactured by the Plaintiff, and upon which the taxes in suit were paid, were not designed for the special purpose of being used on automobile trucks, automobile wagons, or other automobiles, but were designed for use also for uses in other fields in which electricity in portable form was required. The duty required for use in automobiles was also required in various other uses, and the batteries which were applied to these other uses

were identical in design with the batteries used in connection with automobiles. Said batteries were just as applicable for one use as for another where the duties required were the same. (Fact Number 17, R 40.)"

It thus appears that every factor in the definition laid down by this Court as to what does not constitute a "part" has been fully satisfied, and that the Respondent's storage batteries were clearly not "parts" for the automotive vehicles described in the pertinent Revenue Acts.

Storage batteries of the same kind and used for the same purposes, under similar findings of fact, have been held not to be "parts" in the following cases:

PHILADELPHIA STORAGE BATTERY COMPANY V. LEDERER, 21 Fed. (2d) 320 (1927), in which no appeal was taken from the verdict of the District Court and the judgment has been paid.

YALE STORAGE BATTERY COMPANY V. UNITED STATES, 313 CCH 8827 (1930), in which no appeal was taken from the judgment of the District Court.

MCCAUGHN V. ELECTRIC STORAGE BATTERY COMPANY, 63 Fed. (2d) 715 (1933), in which no appeal was taken from the affirmance by the Circuit Court of Appeals of the Third Circuit of the judgment of the District Court.

GENERAL LEAD BATTERIES COMPANY V. UNITED STATES, Ct. Cls., (1932) 60 Fed. (2d) 177.

UNITED STATES LIGHT & HEAT CORP. V. UNITED STATES, 3 F. Supp. 861 (C. Cls., 1933).

ENGLERT MFG. CO. v. UNITED STATES, 3 F. Supp. 873 (C. Cls., 1933).

UNIVERSAL BATTERY CO. v. UNITED STATES, 3 F. Supp. 878 (C. Cls., 1933).

M. & M. CO. v. UNITED STATES, 3 F. Supp. 886 (C. Cls., 1933).

All Courts have consistently followed the decision of this Court in the Universal Battery case, *supra*. The definition which was laid down by this Court was applied consistently in cases which arose before the decision in the Universal Battery case. As stated by the Court of Claims in the case of GENERAL LEAD BATTERIES COMPANY v. UNITED STATES, *supra*, the two cases cited by the Petitioner in his brief, to wit, COLE STORAGE BATTERY COMPANY v. UNITED STATES, 65 Ct. Cl. 164, and EDISON STORAGE BATTERY COMPANY v. UNITED STATES, 67 Ct. Cl. 543, were not inconsistent because in each of those cases there was no finding that the batteries were equally adapted for use other than on automobiles, or were, in fact, so used, but on the contrary the findings were that they were primarily designed and primarily adapted for use only on automobiles, and in each case the taxpayer contented himself with showing only that they "might" have been used for other purposes.

The quotations from the decision of the Circuit Court of Appeals for the Sixth Circuit in the case of WEIR v. MCGRATH, 41 Fed. (2d) 1021 (1930) cited in the Petitioner's brief on pages 15 and 19, do not correctly set forth the rule of construction

of that Court. A reading of the whole opinion discloses that the principle laid down is exactly that for which the Respondent contends, and which this Court announced a year later in the Universal Battery case, *supra*.

The findings of the Court below being full and complete that the Respondent's storage batteries were widely, commonly and generally sold for a great many other purposes and were, in fact, so used, and that such other uses were not incidental to use on automobiles, and these findings being supported by overwhelming evidence, none of which was controverted, it is submitted that the judgment of the Court below must be affirmed.

2. THE RULE OF CHIEF USE DOES NOT APPLY TO THIS CASE.

The Petitioner's argument is that the Court should take judicial notice that the principal use of these storage batteries was on automobiles, and that the evidence shows that such was the principal use. In the first place, the Court can not take judicial notice of such fact, because the chief use was not on automobiles; and secondly, as hereinafter pointed out, the evidence in the case at bar demonstrates that the chief use was not on automobiles.

Chief or principal use of an article under the pertinent Revenue Acts has no application in cases where it is found that there is wide, general and common use and equal adaptability. This is what this Court

said in the Universal Battery case, *supra;* is exactly what the Treasury Department said in the definition in its Regulations; and, more specifically, this is what this Court said in the case of MAGONE v. HELLER, *supra.* In that case, the Tariff Act of 1883 imposed duties on compounds of potash, and among the articles upon the free list were "all substances expressly used for manure." The question was whether the common use, which we contend meant principal use, of the plaintiff's article was for manure. The Court in holding that if it was commonly and generally used for other purposes, *even though the principal use was for manure*, it could not be held to be used expressly for manure, said:

> "If the only common use of a substance is to be made into manure or to be itself spread upon the land as manure, the fact that occasionally or by way of experiment it is used for a different purpose will not take it out of the exemption. But if it is commonly, practically and profitably used for a different purpose, it can not be considered as 'expressly used for manure,' even if in the majority of instances it is so used."

This Court in the case of MAGONE v. WIEDERER, *supra,* in commenting upon the foregoing case, said:

> "It follows that whilst Magone *v.* Heller adhered to the settled rule of chief use, a guide was there announced by which to discover whether the facts established such chief use. *Chief use in itself is a vague and uncertain term.*" (Italics ours.)

As pointed out by this Court, therefore, the concept of chief use has no application if it be found that the article is equally adapted for other uses, and is widely, commonly and generally put to such uses, and that such other uses are not incidental to use on automobiles.

It is submitted that the rule of chief or principal use has application only in those cases construing the Tariff Acts where duties are imposed upon articles which by the language of the Acts themselves are "used for" or "used expressly for" or some other similar language which clearly imports chief use. Thus the Petitioner's suggested application of the rule of chief use is not proper in this case.

Under the facts, Petitioner's argument must also fall, because the Court below found that the other uses of Respondent's batteries were not incidental to use on automobiles. (Finding Number 15, R-40.) The whole burden of the Petitioner's argument is based on his statement that the other uses were "diverted from" or "incidental to" use on automobiles, but this is clearly not so and the Court below refused the Petitioner's request to find that the principal or chief use of the batteries was in automobile trucks and other automobiles. (Request Number 14, R-20; Refused R-21.)

The refusal of the District Court to make the finding requested by Petitioner that chief use of Respondent's batteries was upon automobiles is amply supported by uncontroverted testimony of Respondent's

retail dealers, who stated that their sales during the taxable period of Respondent's batteries of the types actually used upon automobiles were made in greater quantities for radio or marine use than for use on or in connection with automobiles. For instance, one dealer stated that "Our radio business overcame our other uses." (R. 78), and another dealer stated that "During the years 1922 to 1926 about seventy-five percent of my business in the sale of 'SLI' type of Willard batteries was for other use than for use in automobiles and automotive trucks. They were used principally in the motor boat fields, marine and the radio" (R. 80).

It will be remembered that a storage battery is an apparatus for storing electricity in chemical form and discharging it in electrical form. It consists of a jar of glass or rubber containing positive and negative cells consisting of plates immersed in a solution of sulphuric acid. No matter what the size of the cells may be, each cell produces two volts of electricity, so that the sole criterion as to the number of cells, size and shape of the battery is the duty required of it (R-35, 36, 37), and is applicable for every use where electricity in portable form may be required. The sole duty required of it is the number of volts which it releases and the rate of discharge of such current, and the former depends on the number of cells and the latter on the size of the plates. (R-35, 36, 37.)

The Court has found upon "a wealth of evidence"

that storage batteries were in wide, commor and general use before automobiles were invented, and that they were first applied to automobiles in about 1912 or 1913, and they continued to be used after that time for an ever increasing number of purposes other than automobiles; in fact, wherever electricity in portable form was used. To refute the inferences to be drawn from the Petitioner's statement that the evidence shows that the principal use of the batteries was on automobiles would require a discussion of the entire evidence, which is beyond the legitimate confines of this brief. For the convenience of the Court, however, there is set forth in the appendix to this brief on page A-20 a statement of the various uses, some 92 in number, with the references.

To request the Court to take judicial notice that the principal use of storage batteries is on automobiles is absurd. The fact remains that the Court, on the contrary, would have to take judicial notice of the fact that the principal use was *not* on automobiles, and that storage batteries were a commercial commodity widely, commonly and generally used long before automobiles were invented, and that when the automobile first used them to any extent, the automotive industry adopted a commercial commodity and adapted its automobile to the storage battery. (Finding Number 12, R-17.)

The Respondent concedes that words in a tax statute should be given their ordinary and commonly understood meaning, but at the same time in a tax

statute the Court has no power to inquire into the intent of Congress but must adhere to the fundamental principle that only those things can be taxed which by the statute are specifically made the subject of the tax, and that the provisions of a taxing statute shall not be extended by implication beyond the language used.

UNITED STATES v. MERRIAM, 263 U. S. 179; 68 L. Ed. 240 (1923);

GOULD v. GOULD, 245 U. S. 151; 62 L. Ed. 211 (1917);

UNITED STATES v. CARROLL CHAIN COMPANY, 8 Fed. (2d) 529 (1925).

3. AS TO THE EFFECT OF THE REVENUE ACT OF 1932.

The Revenue Acts of 1921 and 1924 were repealed by the Revenue Act of 1926, and the Revenue Act of 1932 was passed six years after the repeal of the former Acts. The Petitioner argues that because the Revenue Act of 1932 imposes a tax upon the sales price of storage batteries, *eo nomine,* "suitable for use on" automobiles, there was evidenced an intention by Congress that the phraseology used in the former Revenue Acts intended to make storage batteries taxable as "parts" for automobiles. But the well settled rule of law produces an exactly opposite result, because it requires the construction that by specifically describing an article in the later Act, Congress recognized that the article so described was

not subject to tax liability in the earlier Act, and intended to change the earlier Act.

United States v. Woodruff, 175 Fed. 776 (1909);

Brewster v. Gage, 280 U. S. 327, 74 L. Ed. 457 (1930).

It is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

CHARLES C. NORRIS, JR.,
PHILIP DECHERT.

REVENUE ACT OF 1921. 42 ST. L. 227. TITLE IX.

Sec. 900. That from and after January 1, 1922, there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentage of the price for which so sold or leased:

(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;

(2) Other automobiles and motorcycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;

(3) Tires, inner tubes, parts, or accessories, for any of the articles enumerated in sub-division (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in sub-division (1) or (2), 5 per centum.

Act passed November 23, 1921.
Effective November 23, 1921.

REVENUE ACT OF 1924. 43 ST. L. 253. TITLE VI.

Sec. 600. On and after the expiration of thirty days after the enactment of this act there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer,

producer, or importer, a tax equivalent to the following percentage of the price for which so sold or leased:

(1) Automobile truck chassis and automobile wagon chassis sold or leased for an amount in excess of $1,000. and automobile truck bodies and automobile wagon bodies sold or leased for an amount in excess of $200. (including in both cases tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the sale thereof), 3 per centum. A sale or lease of an automobile truck or of an automobile wagon shall, for the purpose of this sub-division, be considered to be a sale of the chassis and of the body.

(2) Other automobile chassis and bodies and motorcycles (including tires, inner tubes, parts and accessories therefor sold on or in connection therewith or with the sale thereof) except tractors, 5 per centum. A sale or lease of an automobile shall, for the purpose of this sub-division, be considered to be a sale of the chassis and of the body.

(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in sub-division (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in sub-division (1) or (2), 2½ per centum. This sub-division shall not apply to chassis or bodies for automobile trucks, automobile wagons or other automobiles.

Act passed June 2, 1924.
Act effective July 3, 1924.

SECTION 424, REVENUE ACT OF 1928.

(*a*) No refund shall be made of any amount paid by or collected from any manufacturer, producer, or importer in respect of the tax imposed by subdivision (3) of section 600 of the Revenue Act of 1924, or subdivision (3) of section 900 of the Revenue Act of 1921 or of the Revenue Act of 1918, unless either—

(1) Pursuant to a judgment of a court in an action duly begun prior to April 30, 1928; or

(2) It is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of an article subject to tax, or that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him; or

(3) The Commissioner certifies to the proper disbursing officer that such manufacturer, producer, or importer has filed with the Commissioner, under regulations prescribed by the Commissioner with the approval of the Secretary, a bond in such sum and with such sureties as the Commissioner deems necessary, conditioned upon the immediate repayment to the United States of such portion of the amount refunded as is not distributed by such manufacturer, producer, or importer within six months after the date of the payment of the refund, to the persons who purchased for purposes of consumption (whether from such manufacturer, producer, importer, or from any other person) the articles in respect of which the

refund is made, as evidenced by the affidavits (in such form and containing such statements as the Commissioner may prescribe) of such purchasers, and that such bond, in the case of a claim allowed after February 28, 1927, was filed before the allowance of the claim by the Commissioner.

(*b*) The second proviso under the heading "Internal Revenue" in section 1 of the First Deficiency Act, fiscal year 1928, and the second proviso of the fourth paragraph under the heading "Internal Revenue Service" in section 1 of the Treasury and Post Office Appropriation Act for the fiscal year 1929, are repealed.

Act passed May 29, 1928.

SECTION 989 REVISED STATUTES, Act of 3 March, 1863 CH. 16; 12 Stat. L. 741.

When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the Treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury.

SECTION 3226 R. S. AS AMENDED BY SECTION 1113 REVENUE ACT, 1926.

No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail.

(*b*) This section shall not affect any proceeding in court instituted prior to the enactment of the Revenue Act of 1924.

TREASURY REGULATIONS 47, Promulgated May 1, 1919, under Section 900 of the Revenue Act of 1918.

ART. 15. Definition of parts. A "part" for an automobile truck, automobile wagon, other automobile, or motorcycle is any article designed or manufactured for the special purpose of being used as or to replace a component part of any such vehicle, and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use, and which is primarily adaptable only for use as a component part of such vehicle. Mere stock or commercial commodities such as bolts, nuts, washers, screws, though used as components for such vehicles, are not "parts" within the meaning of subsection (3) of section 900. Articles, however, which ordinarily would be classed as commercial commodities become parts when, because of their design or construction, they are primarily adaptable for use as component parts of such vehicles. Component parts of articles taxable under this definition are taxable when sold separately, if they have reached such stage of manufacture that they are primarily adaptable for use as such a component part. Thus plates, jars, and separators for automobile storage batteries are taxable when sold separately. A chassis is a part of an automobile and taxable at the rate of 5 per cent. when sold separately regardless of whether it is a chassis for an automobile truck or wagon, or for any other kind of automobile. An automobile body is also a part of an automobile.

TREASURY REGULATIONS 47, Revised December 27, 1920.

ART. 15. Definition of parts. A "part" for an automobile truck, automobile wagon, other automobile, or motor cycle is any article designed or manufactured for the special purpose of being used as or to replace a component part of any such vehicle and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use and which is primarily adapted only for use as a component part of such vehicle.

The term includes bodies, wheels, engines, springs, axles, radiators, etc. When sold separately a side car and a so-called trailer or "semitrailer" so designed that a portion of the load or the weight thereof is carried or borne by the tractor or "semitractor" are taxable as "parts."

Mere stock or commercial commodities, such as bolts, nuts, washers, screws, etc. though used as components for such vehicles, are not "parts" within the meaning of subdivision (3). Articles, however, which ordinarily would be classed as commercial commodities become parts when, because of their design or construction, they are primarily adapted for use as component parts of such vehicles.

Component parts of articles taxable under this definition are taxable when sold separately if they have reached such stage of manufacture that they are primarily adapted for use as a component part. Thus plates, jars and separators for automobile

storage batteries are taxable when sold separately. Blow-out shoes and reliners of tires are subject to tax as "parts" regardless of the fact that they may be made from old casings.

TREASURY REGULATIONS 47, revised January 6, 1922.

ART. 15. *Definition of parts.* A "part" for an automobile truck, automobile wagon, other automobile, or motor cycle is any article designed or manufactured for the special purpose of being used as or to replace a component part of any such vehicle and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use and which is primarily adapted only for use as a component part of such vehicle.

The term includes bodies, wheels, engines, springs, axles, radiators etc. When sold separately a side car and a so-called trailer or "semitrailer" so designed that a portion of the load or the weight thereof is carried or borne by the tractor or "semitractor" are taxable as "parts."

Mere stock or commercial commodities, such as bolts, nuts, washers, screws, etc., though used as components for such vehicles, are not "parts" within the meaning of subdivision (3). Articles, however, which ordinarily would be classed as commercial commodities become parts when, because of their design or construction, they are primarily adapted for use as component parts of such vehicles.

Component parts of articles taxable under this definition are taxable when sold separately if they have reached such stage of manufacture that they are primarily adapted for use as a component part. Blow-out shoes are subject to tax as "parts" regardless of the fact that they may be made from old castings.

TREASURY REGULATIONS 47, Revised August 1924.

ART. 16. A "part" for an automobile truck, automobile wagon, or other automobile chassis or body, or motorcycle, is any article designed or manufactured for the special purpose of being used as, or to improve, repair or replace a component part of any such vehicle, or article, and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use, or which is primarily adapted only for use as a component part of such vehicle or article.

An "accessory" for an automobile truck, automobile wagon, or other automobile chassis or body, or motorcycle, is an article designed to be attached to or used in connection with such vehicle or article to add to its utility or ornamentation, or any article which is primarily adapted for use in connection with such vehicle or article whether or not essential to its operation or use.

ARTICLE 1255, REGULATIONS OF TREASURY, NUMBER 74 (1928) 322 CCH. 1669.

Claims for refund in case of judgment obtained against collector. (a) Claims for the amount of a judgment against a collector of internal revenue for the recovery of taxes, penalties, or other sums should be made on Form 843 and filed with the Commissioner of Internal Revenue, Washington, D. C. The claimant should state the grounds of his claim under oath, giving the names of all the parties to the suit, the cause of action, the date of its commencement, the date of the judgment, the court in which it was recovered, and its amount. To this affidavit there should be annexed a certified copy of the final judgment in duplicate, a certificate of probable cause, and an itemized bill of the costs paid, receipted by the clerk or other proper officer of the court.

OPINION OF THE DISTRICT COURT BELOW ON SEC. 424, REVENUE ACT OF 1928.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

Willard Storage Battery Company, Plaintiff. v. *C. F. Routzahn, Collector of Internal Revenue, 18th District of Ohio, Defendant.*	AT LAW	15761 15762 15763 15764 15765

OPINION HANDED DOWN DECEMBER 16, 1929, UPON MOTION TO DISMISS.

WEST, *District Judge:*

Until these matters were argued, I was unaware that the question raised by the motions had been previously considered and passed upon by Judge Jones in Sterling Spring Co. *v.* Routzahn, Collector, No. 15574. In conference with him, he expressed the opinion that his memorandum should not be regarded as the law of the district on the question presented in these motions, especially since no review of that case was taken.

Plaintiff sues the collector for the recovery of the manufacturer's excise taxes paid on electric storage batteries and erroneously imposed, as it is claimed, under Secs. 900 (3) of the Revenue Act of 1921, and 600 (3) of the Revenue Act of 1924. The taxes are alleged to have been illegal, because

the batteries sold by plaintiff did not constitute parts or accessories for any of the articles enumerated in subdivision (1) or (2), Sec. 900, Revenue Act of 1921, or in subdivisions (1) or (2), Sec. 600, Revenue Act of 1924, and neither the batteries nor the sales thereof by plaintiff were subject to be taxed. Defendant moves to dismiss on the ground that Sec. 424, Revenue Act of 1928 (Sec. 2424, Tit. 26, U. S. C.) deprives plaintiff of its privilege of refund and of maintaining an action begun subsequent to May 29, 1928; for lack of jurisdiction in the court to review the discretionary power vested in the Commissioner by the provisions of said Sec. 424, and because that section provides an exclusive remedy. Said section reads as follows:

> "No refund shall be made of any amount paid or collected from any manufacturer, producer, or importer in respect of the tax imposed by subdivision (3) of Section 600 of the Revenue Act of 1924, or subdivision (3) of section 900 of the Revenue Act of 1921 or of the Revenue Act of 1918, unless either
>
> (1) Pursuant to a judgment of a court in an action duly begun prior to April 30, 1928; or
>
> (2) It is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of an article subject to tax, or that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him; or

(3) The Commissioner certifies to the proper disbursing officer that such manufacturer, producer, or importer has filed with the Commissioner, under regulations prescribed by the Commissioner with the approval of the Secretary, a bond in such sum and with such sureties as the Commissioner deems necessary, conditioned upon the immediate repayment to the United States of such portion of the amount refunded as is not distributed by such manufacturer, producer, or importer, within six months after the date of the payment of the refund, to the persons who purchased for purposes of consumption (whether from such manufacturer, producer, importer, or from any other person) the articles in respect of which the refund is made, as evidenced by the affidavits (in such form and containing such statements as the Commissioner may prescribe) of such purchasers, and that such bond, in the case of a claim allowed after February 28, 1927, was filed before the allowance of the claim by the Commissioner."

Since its enactment, the excise taxes mentioned in the first clause, however illegal or erroneous, can be refunded only in accordance with its provisions.

It is the defendant's contention that a discretionary power is committed to the Commissioner with respect to all the said illegal exactions, except such as are covered by the judgment of a court mentioned in sub (1); and that, in the exercise thereof, the Commissioner alone must determine whether or not the taxes were lawful, the courts being deprived of all jurisdiction in the premises.

I can not agree with this view, and in my opinion, the language of the statute leads directly to another result. Under sub (2) claims for excessive taxes collected upon sales or leases which were properly subject to a lesser tax, and claims for illegal taxes which either were not collected by the taxpayer from the purchaser or lessee, or if collected, have been returned to him, are dealt with by the Commissioner. But whether his power with respect to such claims or any of them is final, and what if any jurisdiction the courts may have as to such claims, seems to me beside the precise question involved. For, under the averments of the plaintiff's petitions, the claims sued on are of an entirely different character. The taxes were not assessed in an excessive amount upon sales which were taxable, and there is no intimation, either in the petitions or motions that they were not collected from, or were returned to the purchasers of the articles. The distinction between taxes which are excessive in amount and those which are entirely illegal, was clearly in the mind of Congress. This is shown by the Report No. 2 of the Committee on Ways and Means of the House, of December 7, 1927, wherein, at p. 27, after stating that the committee did not believe that, as a general principle, taxes paid upon articles subsequently held to be not taxable should be refunded and thus unjustly enrich the manufacturers, who merely collect the tax from the persons to whom they sold the articles, it is said:

"However there are some cases where refunds should properly be made. Accordingly section 424 of the new bill provides that judgments of the court should be paid if the action was begun prior to the effective date of the Deficiency Act. It also provides that refunds may be made whenever the taxpayer can establish to the satisfaction of the Commissioner that the amounts he paid was excessive (not by reason of the fact that the article was wrongly taxed, but by reason of the fact that the tax was improperly computed)."

The language of the section naming as one condition upon which refunds may be made that "it is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of an article subject to tax," embodies the view of the Committee. It further appears by Conference Report No. 1362, May 25, 1928, that the original bill passed by the House, prohibited refunds except upon conditions, one being: "or (2) unless the amount was an ordinary over payment of the amount due upon the sale of an article actually subject to the tax."

A tax wholly unauthorized, is not within sub (2), unless it has been passed on to the purchaser or lessee; but falls within subdivision (3) of section 424, and is to be refunded upon the giving of bond conditioned that within six months it will be repaid to the United States, unless in the meantime distributed to the consumers.

The report of the Ways and Means Committee

above mentioned, closes with the statement that "in all other cases" [other than those covered by (1) and (2)] the taxpayer "must comply with conditions similar to those imposed by the proviso in the deficiency act and give a bond conditioned upon the refund of the tax to the ultimate consumer."

It is quite clear from this report that the Committee which announced that as a general principle, taxes paid upon articles subsequently held not taxable ought not to be refunded so as to unjustly enrich the manufacturer, did not regard the temporary refund under sub (3) of the section as being contrary to this principle, evidently because it is not for the benefit of the manufacturer, but solely for that of the consumer.

The court therefore concludes that as to claims such as those of the plaintiff, there has been no effort by Congress to give the Commissioner final power to determine their legality. When presented, he may reject such a claim because he believes that the taxes imposed were not illegal, or for any other sufficient reason, but his action is not final; and the question of legality then becomes one for the courts to determine. Power finally to decide upon the legality of the exaction must reside somewhere, and where the entire amount of such excise taxes is involved, it rests, since the enactment of section 424, just where it did before—that is, in the courts.

Williamsport Wire Rope Co. v. U. S., 277 U. S. 551, is relied upon by the defendant. It was there

held that the power of the Commissioner in determining whether a corporation is entitled under Sections 327 (a) and (b) of the Revenue Act of 1919 to have its war and excess profits taxes fixed by a special assessment under Section 326, by a comparison with the taxes of other representative corporations engaged in like business, is discretionary and not subject to review by the courts. But the language of these sections, as well as the many reasons advanced by the Supreme Court why such a construction was necessary to the consistent administration of the law, sufficiently distinguishes that case from these. Whether or not plaintiff's batteries were accessories within the meaning of the revenue acts, is a question to the determination of which the courts are entirely competent. In the view of the court, there is nothing in the language employed in section 424 which confers discretionary power upon the Commissioner to finally decide upon the legality or illegality of the taxes imposed upon the plaintiff, nor is any reason apparent why such final jurisdiction should have been conferred.

The question now before the court is the plaintiff's right to bring and maintain these actions. They are against the Collector and seek personal judgments only. Whether or not they finally result in collectible claims against him or the United States, the court is bound to entertain them, unless prevented by section 424. It can not now be known with certainty that any judgments recovered will be paid by the United States. Smietanka *v.* U. S., 257 U. S. 1, 4.

If no certificate of probable cause issues by the court and the United States does not become liable, nothing in section 424 relating to refunds from the U. S. Treasury can possibly affect the controversy between the plaintiff and the defendant as it will then stand. That section, whatever power it may confer upon the Commissioner, and take from the courts with respect to the determination of facts as the basis of refunds, would not seem to affect the jurisdiction to maintain an action against a collector for recovery of any excise taxes, even though of a class covered by its provisions.

But if it were now certain that a certificate would issue, the court is of opinion that the section does not cut down the court's jurisdiction, with respect to the particular claims involved in these cases.

If illegality of these taxes is established by judgments, refunds will not be made "pursuant to" such judgments, within the meaning of Sec. 424, sub (1); but pursuant to sub (3), and will be conditional and for the benefit of consumers.

If the petitions may be entertained, it is no objection that they were filed subsequently to April 30 or May 29, 1928.

The motions will be overruled.

S. H. WEST,
Judge.

SPARK PLUG DECISION.

Cumulative Bulletin II-2, p. 308-Jul.-Dec. 1923 11-22-1076: S. T. 426.

It is a well known fact that spark plugs were in use for many years before automobiles came into existence. It is also common knowledge that they are used on all kinds of internal combustion engines, both stationary and portable. It is stated that all the drawings and illustrations in the files of the Patent Office show the use of spark plugs in stationary engines. Spark plugs are made in a few standard sizes, and all engines in which they are to be used are designed for the standard size plugs. There is no question but that the same spark plugs are interchangeable in both stationary and portable engines. While they are used very extensively in automobiles, the same plugs are used in motor boats, airplanes, farm tractors, road graders, railway locomotive engines, threshing machines, concrete mixers, water pumps, hoisting machines, and for innumerable other purposes.

In S. T. 380 (C. B. I-1, p. 444) it was held that piston rings not designed or manufactured with some peculiar characteristic which made them primarily adaptable only on or in connection with automobiles are not taxable. In S. T. 395 (C. B. I-2, p. 295) it was held that leaf-springs, other than highly specialized leaf-springs such as auxilliary shock-absorbing devices using the leaf-spring principle, which are not primarily adapted only for use as a

component part of an automobile or motorcycle, are not taxable. In S. T. 408 (C. B. II 1, p. 285) it was held that miniature incandescent electric light bulbs for use in automobile lamps are commercial commodities and not subject to tax. These rulings were made on the principle that under the definition contained in the regulations it is clear that an article which is sold for general use other than in connection with automobiles and which has no peculiar characteristic in its design or manufacture which adapts it primarily only for use in connection with automobile trucks, automobile wagons, other automobiles, or motor cycles, is not subject to tax as a part, although sold for use in or upon any such vehicle.

Applying the principle in the above cases to spark plugs, where it is clearly shown that the articles in question are not specially designed nor primarily adaptable only for use on or in connection with automobiles but are interchangeable and extensively used in many other industries, it is the opinion of this office that spark plugs should be held to be commercial commodities and not subject to the excise tax imposed by sections 900 (3) of the Revenue Acts of 1918 and 1921.

LIST OF SOME USES OF RESPONDENT'S BATTERIES.

The record of testimony shows that Willard Storage Batteries of the types applicable to automobiles

and upon which the excise taxes in suit were paid, were used during the period from 1922 until 1926 for the following purposes:

Use	Witness	Record
Airplanes (Used to light landing lights, navigation lights, and instrument lights and to operate electric starter.)	R. S. Van Cleve	Pages 71, 72
Army tanks	E. M. Sutherland	Page 57
Bell ringing	L. W. Leonard	Page 78
Bilge Pumps on ships	A. E. Harrold	Page 55
Cabs of Railway cars	E. M. Sutherland	Page 56
Calliopes	A. E. Harrold	Page 53
Camp Kitchen utensils	A. E. Harrold	Page 54
Christmas Tree lighting	E. M. Sutherland	Page 56
Circuit Breaker Operation	A. E. Harrold	Page 54
Compass on ships	A. E. Harrold	Page 55
Concrete mixing machines	C. T. Klug	Page 52
Cranes	L. W. Leonard	Page 78
Custer cars (amusement parks)	H. C. Negus	Page 63
Dental drills	A. E. Harrold	Page 54
Depth Sounding Equipment	R. S. Van Cleve	Page 71
Diesel Engine ignition	A. E. Harrold	Page 54
Ditch digger	C. T. Klug	Page 52
Door Bells	C. T. Klug	Page 52
Drawbridges	A. E. Harrold	Page 55
Drilling Engines	M. J. Brennan	Page 59
Electric Clocks	L. J. Lechner	Page 76
	C. C. Schellentrager	Page 77
Electric Hoists	A. E. Harrold	Page 55
Emergency engines	A. E. Harrold	Page 53
Emergency lights	W. E. Bender	Page 68
Emergency lighting on Steamships	A. E. Harrold	Page 54
Experimental Work in laboratories	L. J. Lechner	Page 76
Excavators	C. T. Klug	Page 51
Fans	A. E. Harrold	Page 54
Fire alarm systems	A. E. Harrold	Page 54
Fog Horns	A. E. Harrold	Page 54
Gas engine ignition	A. E. Harrold	Page 54
Gasoline cranes	C. T. Klug	Page 51
Gasoline shovels	C. T. Klug	Page 51
Gun Firing in Navy	R. S. Van Cleve	Page 71
Harvesting machinery	C. T. Klug	Page 51
Heating Apparatus on Boats	A. E. Harrold	Page 54
Heat Regulating Devices	A. E. Harrold	Page 54
Hospital Lights	L. J. Lechner	Page 76

Use	Witness	Record
Hot Coil ignition (Diesel engine)	E. M. Sutherland	Page 56
Hydraulic pumps	H. C. Negus	Page 63
Incandescent lamp testing	A. E. Harrold	Page 53
Industrial trucks	A. E. Harrold	Page 54
Intercommunicating telephone systems	W. E. Bender	Page 68
	C. C. Schellentrager	Page 77
Isolated lighting systems	A. E. Harrold	Page 54
	C. T. Klug	Page 52
	A. E. Harrold	Page 54
	M. J. Brennan	Pages 59, 60, 61
	R. S. Van Cleve	Page 74
	L. J. Lechner	Page 76
	C. C. Schellentrager	Page 77
	W. W. Parsons	Page 79
Kitchen cooking (galley apparatus)	A. E. Harrold	Page 54
Laboratory machinery	L. W. Leonard	Page 78
Laboratory testing	C. T. Klug	Page 52
	E. M. Sutherland	Page 56
	L. S. Lechner	Page 76
Logging machines	H. C. Negus	Page 63
Manhole lighting	E. M. Sutherland	Page 56
Marine engines	C. T. Klug	Page 51
	M. J. Brennan	Pages 59, 60, 61
Microferometers	A. E. Harrold	Page 53
Micrometer Calipers	A. E. Harrold	Page 53
Mine Locomotives	A. E. Harrold	Page 54
Motor Boats	H. C. Negus	Page 63
	R. S. Van Cleve	Page 71
	L. W. Leonard	Page 78
	W. W. Parsons	Page 79
	C. E. Haas	Page 80
Moving Picture Machines	A. E. Harrold	Pages 54, 55
	L. J. Lechner	Page 76
Oil Circuit Breakers (switch)	A. E. Harrold	Pages 53, 54
	W. E. Bender	Page 68
	C. C. Schellentrager	Page 77
Oil motor pre-ignition	L. W. Leonard	Page 78
Pneumatic tools (compressors etc.)	E. M. Sutherland	Pages 57, 58
Police Alarm Systems		
Portable lights (for fires, etc.)	H. C. Negus	Page 63
Portable Public Address Systems	H. C. Negus	Page 63
Potentiometers	A. E. Harrold	Page 53
Power Carrier Telephones	H. C. Negus	Page 63
Pyrometers	A. E. Harrold	Page 54

Use	Witness	Record
Radio (receiving)	C. T. Klug	Page 52
	A. E. Harrold	Page 54
	E. M. Sutherland	Page 57
	H. C. Negus	Pages 63, 64
	Frank Denzel	Pages 66, 67
	W. E. Bender	Page 68
	R. S. Van Cleve	Pages 70, 71
	L. G. Baldwin	Pages 73, 74
	L. J. Lechner	Page 76
	C. C. Schellentrager	Page 77
	L. W. Leonard	Page 78
	W. W. Parsons	Page 80
	C. E. Hans	Page 80
Radio broadcasting, filament, remote control, amplifiers, etc.	A. E. Harrold	Page 54
	H. C. Negus	Page 63
	R. S. Van Cleve	Pages 70, 71
	L. G. Baldwin	Pages 73, 74, 75
Railroad signals	A. E. Harrold	Page 54
Railway speedsters	E. M. Sutherland	Page 56
Road building machinery	C. T. Klug	Pages 51, 52, 53
	M. J. Brennan	Page 59
	W. W. Parsons	Pages 79, 80
Road roller	C. T. Klug	Page 51
Rudder indicator on ships	A. E. Harrold	Page 54
Semi-Diesel engine ignition	A. E. Harrold	Page 54
Signals in schools	W. W. Parsons	Page 79
Snow machinery	M. J. Brennan	Page 58
Stationary engines	C. T. Klug	Page 51
	A. E. Harrold	Page 54
	C. C. Schellentrager	Page 77
Steamship enunciators	A. E. Harrold	Page 54
Steamship steering apparatus	A. E. Harrold	Page 54
Street sweepers	E. M. Sutherland	Page 58
Telephone Systems	A. E. Harrold	Pages 53, 54
Telegraph	A. E. Harrold	Page 54
	C. T. Klug	Page 52
Time Clocks	E. M. Sutherland	Page 57
Toy trains and other mechanical toys	H. C. Negus	Page 63
	L. W. Leonard	Page 78
Tow Boats	E. M. Sutherland	Page 57
Train control	M. J. Brennan	Page 58
Train lighting	A. E. Harrold	Page 55

Use	Witness	Record
Tractors	C. T. Klug	Page 51
	M. J. Brennan	Page 59
	L. J. Lechner	Page 76
	E. M. Sutherland	Page 56
Vacuum Tube Testing	A. E. Harrold	Page 53
Ventilating systems	A. E. Harrold	Page 54
Weighing machines	M. J. Brennan	Page 59
Welding	A. E. Harrold	Page 54
	M. J. Brennan	Page 58
	C. C. Schellentrager	Page 77
Winches on ships	A. E. Harrold	Page 55
Yachts	A. E. Harrold	Page 53, 54

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 171

THE UNITED STATES, PETITIONER

vs.

JEFFERSON ELECTRIC MANUFACTURING COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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1 In the Court of Claims

No. K-94

JEFFERSON ELECTRIC MANUFACTURING CO., PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

I. *Petition*

Filed March 25, 1929

To the Honorable Court of Claims:

The plaintiff, the Jefferson Electric Manufacturing Company, respectfully represents:

I

That it is and was at all times hereinafter mentioned a corporation organized and doing business under the laws of the State of Illinois, with principal offices in the City of Chicago, county of Cook, State of Illinois.

II

That no action has been taken upon this claim other than herein set forth before Congress or any department of the Government, or in any court; that no person other than the claimant is the owner thereof or interested therein; that no assignment or transfer of this claim, or any part thereof, or interest therein, has been made; that the claimant has not in any way voluntarily aided, abetted or given encouragement to rebellion against the Government of the United States.

2 III

That this suit arises under the revenue laws of the United States and is for the recovery of manufacturer's excise taxes illegally and erroneously assessed against and collected from the plaintiff by the defendant under the alleged authority of section 900 of the revenue acts of 1918 and 1921, and sec. 600 of the Revenue act of 1924.

IV

That the plaintiff is now, and has been at all times herein mentioned, engaged in the manufacture and sale of ignition coils and that, pursuant to the requirements of the Commissioner of Internal Revenue, it filed monthly lists of sales and, in order to avoid the

imposition of penalties against it and the distraint of its property, involuntarily paid to the Collector of Internal Revenue for the first collection district of Illinois, at Chicago, Illinois, the manufacturer's excise tax levied on automobile parts or accessories by the statutes aforesaid, on all the ignition coils manufactured and sold by it during the period February 24, 1919, to February 26, 1926, inclusive, in the total amount of sixty-eight thousand eight hundred sixty-seven dollars twenty-two cents ($68,867.22) as shown by the lists of monthly payments accompanying the claims for refund attached hereto, marked Exhibits A, B, and C; and that the said Collector paid the said sum of money into the Treasury of the United States.

V

That on May 11, 1923, the plaintiff filed with the Collector of Internal Revenue at Chicago, Illinois, a claim for refund of
3 said excise taxes (claim no. 302611) paid by it during the period February 24, 1919, to March 31, 1923, in the amount of $48,080.83 (exhibit A, attached to this petition); that on March 25, 1925, the plaintiff filed with the said collector a claim for refund of said excise taxes (claim no. 343007) paid by it during the period April 1, 1923, to December 31, 1924, in the amount of $15,363.79, which claim was later corrected to agree with the collector's records of payments during said period in the amount of $15,734.93 (exhibit B, attached to this petition); that on September 15, 1926, the plaintiff filed with the said collector a claim for refund of said excise taxes (claim no. 355415) paid by it during the period January 1, 1925, to February 26, 1926, in the amount of $5,051.46 (exhibit C, attached to this petition).

VI

That on September 26, 1923, the Commission of Internal Revenue wrote a letter to the plaintiff saying that claim no. 302611 "is acordingly rejected in full." That on December 1, 1924, Deputy Commissioner of Internal Revenue R. M. Estes wrote a letter to the plaintiff with reference to claim no. 302611, saying "no action has been taken on your claim." That on October 7, 1926, Eugene McGovern, Acting Deputy Commissioner of Internal Revenue, wrote a letter to the plaintiff saying that said claim had been "taken up for consideration." That on June 23, 1927, Acting Commissioner of Internal Revenue C. R. Nash whote a letter to the plaintiff saying that "the action previously taken by this bureau in rejecting the claims is sustained." That on or about December 10, 1928, the Commissioner of Internal Revenue allowed said claim no. 302611
4 in the amount of $46,758.53 and rejected it in the amount of $1,322.30, which said allowance by the Commissioner was paid by check no. 327,180 in the amount of $68,241.58, including interest as provided by law.

VII

That the plaintiff is informed and believes that the amount refunded by the Commissioner as aforesaid was on account of manufacturer's excise taxes paid by it during the period May 1, 1919, to March 31, 1923, inclusive, in the amount of $46,758.53; and that the Commissioner rejected said claim no. 302611 (exhibit A) in the amount of $1,322.30, being excise taxes paid by the plaintiff during the period February 24 to April 30, 1919, for the reason that plaintiff billed said tax during said period of February to April, 1919, to its customers.

VIII

That on January 15, 1926, C. R. Nash, Acting Commissioner of Internal Revenue, wrote a letter to the plaintiff referring to claim no. 343007 (exhibit B) in tenor as follows:

"Reference is made to your claim filed for refund of $15,363.79, representing manufacturer's excise tax paid for the months of April, 1923, to December, 1924, inclusive.

"The claim is based upon the contention that ignition coils on which this tax was paid are general commercial commodities and not automobile parts, and the amount of tax paid thereon should be refunded.

"In this connection you are advised it is considered the ignition coils in question are automobile parts within the meaning of section 900 of the Revenue Act of 1921, and section 600 of the Revenue Act of 1924, and properly subject to tax as such.

"An attorney for your company was previously advised at a conference in this office that while the bureau holds iginition coils for automobiles are subject to tax, a case is now pending in the courts which may have a considerable bearing on this instant case. This office will hold to its previous position until a final decision in the matter is rendered. Should the court decision be adverse to this office's holdings, upon request from you that the claim be reopened, the claim will be taken up for reconsideration."

That on October 7, 1926, Eugene McGovern, Acting Deputy Commissioner of Internal Revenue, wrote a letter to the plaintiff with reference to claims nos. 302611 and 343007 (exhibits A and B), saying that "the claims have now been taken up for consideration." That on November 27, 1926, Deputy Commissioner of Internal Revenue R. M. Estes wrote a letter to the plaintiff with reference to claims nos. 302611, 343007 and 355415 (exhibits A, B, and C), saying that "the claims have now been taken up for consideration." That on June 23, 1927, Acting Commissioner of Internal Revenue C. R. Nash wrote a letter to the plaintiff referring to claims nos. 302611 and 343007, saying that "the action previously taken by this bureau

in rejecting the claims is sustained." That there had been no action taken by the bureau rejecting claim no. 343007 prior to June 23, 1927.

IX

That on or about December 13, 1928, the Commissioner of Internal Revenue allowed claim no. 343007 for $768.76, and on December 19, 1928, the Collector of Internal Revenue at Chicago, Illinois, transmitted to the plaintiff check no. 328,541 for $1,023.08 which included interest in the amount of $254.32. That plaintiff is advised and believes that said refund was the amount of tax paid by it on account of sales during the month of April, 1923. That plaintiff has received no written notification of the disallowance of said claim no. 343007, as required by section 3226 of the Revised Statutes, as amended by section 1113 (a) of the Revenue Act of 1926, and it does not know whether said claim has been rejected for the balance of $14,966.17.

X

That on June 24, 1927, Acting Commissioner of Internal Revenue C. R. Nash wrote a letter to the plaintiff with reference to claim no. 355415 (exhibit C), in tenor as follows:

"Reference is made to your claim for refund of $5,051.46 paid as manufacturer's excise tax on automobile parts and accessories.

"You were requested to advise within 20 days whether you intended to comply with Treasury Decision 4015 in the prosecution of your claim.

"Since no reply has been received from you within the time specified it is assumed you do not intend to prosecute the matter further along the lines suggested and your claim is hereby rejected for lack of evidence."

That on November 22, 1928, Acting Commissioner of Internal Revenue H. P. Mires wrote to the plaintiff, with reference to claim no. 355415, saying "the previous action taken in rejecting your claim must stand."

XI

That on May 14, 1927, Deputy Commissioner of Internal Revenue R. M. Estes wrote a letter to the plaintiff referring to plaintiff's three claims for refund (exhibits A, B, and C), calling attention to Treasury Decision 4015, covering the requirements to be observed by manufacturers in perfecting claims for the refunding of amounts in respect of the tax imposed by section 600 (3) of the Revenue Act of 1924 and/or section 900 (3) of the Revenue Acts of 1918 and 1921 and requesting plaintiff to advise him whether it intended to prosecute the claims and at the required time to furnish bond and proof of distribution as required by law and saying that if plaintiff did not answer within thirty days it would be presumed

that it did not intend to prosecute the matter further and that the claims would be rejected for lack of evidence.

XII

That of all the taxes paid by the petitioner to the United States as and for manufacturer's excise taxes on ignition coils manufactured and sold by it during the period February 24, 1919, to February 26, 1926, amounting to $68,867.22, only $1,322.30 was added to its invoices and billed to its customers. That during the period February 24, 1919, to April 30, 1919, the petitioner billed said amount of $1,322.30 to its customers by adding the same to its invoices of ignition coils manufactured and sold by it. That of said amount a considerable sum, the exact amount of which is not now determinable, was deducted from payments of invoices by plaintiff's customers and was never collected by plaintiff. That after it had followed the practice of adding the tax to the sales price of its
8 ignition coils for about three months, as aforesaid, plaintiff ceased to add the tax to the purchase price of the coils and no longer attempted to collect it from its customers and it thereafter absorbed the tax and paid it from its own funds without increasing the sales price of the coils and continued to report the sales of its ignition coils from month to month and to pay the tax thereon as required by the Commissioner of Internal Revenue. That no part of said $1,322.30 is sought to be recovered by this suit.

XIII

That the plaintiff alone is entitled to the refund of the amounts of taxes illegally and erroneously collected from it as set forth herein and that no other person or persons paid the same, either directly or indirectly and that no other person or persons has any right, either at law or in equity, to said refunds or any part thereof.

XIV

That said ignition coils so manufactured and sold by the plaintiff are not now and were not at the time of the sales or at any other time "primarily adapted" for use only in automobiles, as provided in section 900 (1), (2), or (3) of said Revenue Acts of 1918 and 1921 and section 600 (5) of the Revenue Act of 1924 or the Regulations of the Treasury Department adopted thereunder; that said ignition coils are not and were not automobile parts and/or automobile accessories, but are and were used for obtaining an electric spark of high voltage and intense heat on various types of internal combustion engines on motor boats, railway cars, speedsters,
9 cement mixers, farm and house lighting plants, tractors, stationary engines, marine engines, airplanes, automobiles, and for other purposes requiring an electric spark of high voltage and intense heat.

XV

That by reason of the facts herein set forth the induction coils manufactured and sold by the plaintiff on which the said tax was levied and collected were and are commercial commodities other than automobile parts and/or accessories and said commodities were not taxable under the provisions of section 900 of the Revenue Acts of 1918 and 1921 and/or section 600 of the Revenue Acts of 1924, and the assessment and collection of such taxes by the Commissioner of Internal Revenue as set forth herein was illegal and erroneous and the amount so collected should be refunded to the plaintiff.

XVI

That the plaintiff, the Jefferson Electric Manufacturing Company, avers that there is now justly due and owing to it by the United States the sum of twenty thousand, seventeen dollars, fifty-eight cents ($20,017.58) with interest thereon as provided by law, after allowing all just credits and offsets.

Wherefore, the plaintiff prays for judgment against the United States for $20,017.58, together with interest at the rate of 6% per annum from the dates of the respective payments of said taxes to the date of the payment of the judgment thereunder.

JEFFERSON ELECTRIC MANUFACTURING CO.,
By JOHN A. BENNAN, *President.*

CHESTER A. GWINN,
Attorney for Plaintiff,
Munsey Building, Washington, D.C.

GEO. P. McCABE,
CHARLES J. TRESSLER,
Of Counsel.

[*Duly sworn to by J. A. Bennan; jurat omitted in printing.*]

Exhibit A—to petition

Claim for

Abatement of tax assessed.
Credit against outstanding assessments.
X Refund of taxes illegally collected.
Refund of amounts paid for stamps used in error or excess.

STATE OF ILLINOIS,
County of Cook, ss:

Jefferson Electric Mfg. Co., 430 S. Green Street, Chicago, Illinois.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

	Period	Year
	From: February	1919
	To: March	1923

1. Business in which engaged: Mfgrs. spark plugs and transformers.
2. Character of assessment or tax: Excise taxes.
3. Amount of assessment or stamps purchased $48,080.83
4. Reduction of tax liability requested (income and profits tax) ..... $
5. Amount to be abated ..... $
6. Amount to be refunded (or such greater amount as is legally refundable) $48,080.83
7. Dates of payment (see collector's receipts or indorsements of canceled checks) .....

(If statement covers income tax liability, items 8–11, inclusive, must be answered.)

8. District in which return (if any) was filed: Chicago, Ill.
9. District in which unpaid assessment appears .....
10. Amount of over payment claimed as credit ..... $
11. Unpaid assessment against which credit is asked; period from ..... to ..... $

Deponent verily believes that this application should be allowed for the following reasons:

That the above amount is a total of monthly excise taxes paid since March 1919, tabulation of which is attached hereto, which this corporation believes was paid in error, as this tax is not applicable to its products. The reasons for filing this claim for refund and this corporation's contention will be incorporated in a brief soon to be filed direct to the Commissioner of Internal Revenue.

(Signed) JAMES C. DALEY,
Treasurer.

Sworn to and subscribed before me this 11th day of May 1923.

E. J. BANIGAN,
Notary Public.

[NOTARIAL SEAL]

Jefferson Electric Mfg. Co.—Manufacturer's excise taxes paid

Year 1919:	
February } March }	$617.59
April	704.71
May	884.88
June	1,156.50
July	1,284.77
August	1,624.27
September	1,597.15
October	1,707.84
November	1,140.59
December	675.34
Total 1919	$11,393.64

Jefferson Electric Mfg. Co.—Manufacturer's excise taxes paid—Continued

13 Year 1920:	
January	$1,048.35
February	1,030.42
March	1,285.28
April	859.19
April	257.76
May	962.54
June	1,606.56
July	1,669.69
August	1,374.32
September	891.51
October	1,119.21
November	800.58
December	191.75
Total 1020	$13,097.15
Year 1921:	
January	$585.86
February	467.67
March	883.99
April	1,025.43
May	1,050.58
June	1,221.50
July	1,110.30
August	1,527.82
September	1,238.18
October	778.39
November	474.13
December	265.33
Total 1921	$10,629.18
14 Year 1922:	
January	$643.19
February	356.52
March	514.13
April	630.33
May	1,265.28
June	1,265.04
July	1,493.94
August	1,429.10
September	1,186.95
October	933.36
November	1,006.35
December	451.20
Total 1922	$11,175.39
Year 1923:	
January	$654.61
February	508.07
March	622.79
Total 1923	$1,785.47

15 *Exhibit B—to petition*

Claim for

Abatement of tax assessed.
Credit against outstanding assessments.
X Refund of taxes illegally collected.
Refund of amounts paid for stamps used in error or excess.

STATE OF ILLINOIS,
County of Cook, ss:

Jefferson Electric Mfg. Co., 501 South Green Street, Chicago, Illinois.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

	Period	Year
	From April 1	1923
	To: Dec. 31	1924

1. Business in which engaged, Mfgrs. spark plugs and transformers.
2. Character of assessment or tax
3. Amount of assessment or stamps purchased $15,734.93
4. Reduction of tax liability requested (income and profits tax) $
5. Amount to be abated $
6. Amount to be refunded (or such greater amount as is legally refundable) $15,734.93
7. Dates of payment (see collector's receipts or indorsements of canceled checks)

(If statement covers income tax liability, items 8–11, inclusive, must be answered.)

8. District in which return (if any) was filed, Chicago, Ill.
9. District in which unpaid assessment appears
16 10. Amount of overpayment claimed as credit $
11. Unpaid assessment against which credit is asked; period from to $

Deponent verily believes that this application should be allowed for the following reasons:

That the above amount is a total of monthly excise taxes paid since April 1, 1923, a tabulation of which is attached hereto, which this corporation believes was paid in error, and that this is not applicable to its products. The reasons for filing this claim for refund and this corporation's contention have been incorporated in briefs filed direct with the Commissioner of Internal Revenue.

(signed) JEFFERSON ELECTRIC MFG. CO.
JOHN A. BENNAN, *Pres.*

Sworn to and subscribed before me this 21st day of March, 1925.

E. J. BANIGAN,
Notary Public.

[NOTARIAL SEAL]

Statement of monthly amounts of excise tax paid to the U.S. Govt. from April, 1923 to Dec., 1924, incl.

1923:

April	$768.76
May	1,026.41
June	1,245.83
July	1,236.90
August	1,261.62
September	1,072.56
October	1,049.54
November	704.99
December	655.80
Total	$9,022.41

Statement of monthly amounts of excise tax paid to the U.S. Govt: from April, 1923 to Dec., 1924, incl.—Continued

17	1924:		
	January	$649.99	
	February	394.61	
	March	584.20	
	April	760.58	
	May	678.76	
	June	758.98	
	July	634.03	
	August	546.96	
	September	505.44	
	October	521.34	
	November	354.04	
	December	323.59	
	Total		6,712.52
	Total claim		$15,734.93

Jefferson Electric Mfg. Co.—Manufacturer's excise taxes paid

	Year 1924:		
	December	$323.59	
	November	354.04	
	October	521.34	
	September	505.44	
	August	546.96	
	July	637.04	
	June	758.98	
	May	678.76	
	April	760.58	
	March	584.20	
	February	394.61	
	January	394.61	
	Total 1924		$6,460.15
18	1923:		
	December	649.99	
	November	655.80	
	October	704.99	
	September	1,049.54	
	August	1,072.56	
	July	1,261.62	
	June	1,236.90	
	May	1,245.83	
	April	1,026.41	
	March		
	February		
	January		
	Total		8,903.64
	Total April, 1923, to Dec. 31, 1924		$15,363.79

19 *Exhibit C—to petition*

Claim for

Abatement of tax assessed.
Credit against outstanding assessments.
X Refund of taxes illegally collected.
Refund of amounts paid for stamps used in error or excess.

STATE OF ILLINOIS,
County of Cook, ss:

Jefferson Electric Mfg. Co., 501 South Green Street, Chicago, Illinois

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

	Period	Year
	From: January 1	1925
	To: February 26	1926

1. Business in which engaged: Mfgrs. spark plugs and transformers.
2. Character of assessment or tax: Excise taxes.
3. Amount of assessment or stamps purchased $5,051.46
4. Reduction of Tax Liability requested (Income and Profits Tax) ..... $.....
5. Amount to be abated ..... $.....
6. Amount to be refunded (or such greater amount as is legally refundable $5,051.46
7. Dates of payment (see Collector's receipts or indorsements of canceled checks .....

(If statement covers income tax liability, items 8–11, inclusive, must be answered.)

8. District in which return (if any) was filed Chicago, Ill.
9. District in which unpaid assessment appears .....
10. Amount of overpayment claimed as credit ..... $.....
11. Unpaid assessment against which credit is asked; period from ..... to ..... $.....

20 Deponent verily believes that this application should be allowed for the following reasons:

That the above amount is a total of monthly excise taxes paid since January 1, 1925, tabulation of which is attached hereto, which this corporation believes was paid in error, and that this is not applicable to its products. The reasons for filing this claim for refund and this corporation's contentions have been incorporated in briefs filed direct with the Commissioner of Internal Revenue.

(*Signed*) JEFFERSON ELECTRIC MFG. CO.,
By J. C. DALEY.

Sworn to and subscribed before me this 11th day of September, 1926.

L. V. JENKINS,
Notary Public.

[NOTARIAL SEAL]

JEFFERSON ELECTRIC MFG. CO.—MANUFACTURER'S EXCISE TAXES PAID

Year 1925:

January	$371.07	
February	356.68	
March	366.60	
April	425.70	
May	434.39	
June	442.58	
July	470.98	
August	496.31	
September	388.83	
October	408.07	
November	233.31	
December	204.11	
		$4,598.63

JEFFERSON ELECTRIC MFG. CO.—MANUFACTURER'S EXCISE TAXES PAID—Continued

Year 1926:

January	$311.28	
February	141.50	
		452.83
Total January 1, 1924, to February 26, 1926		$5,051.46

21

II. *History of proceedings*

On May 3, 1929, the defendant filed a demurrer to the plaintiff's petition.

On January 13, 1930, the demurrer was submitted without argument.

On February 10, 1930, the court handed down the following opinion, by Littleton, J., overruling the demurrer:

III. *Opinion of the court on demurrer*

LITTLETON, Judge, delivered the opinion of the court:

This suit, instituted March 25, 1929, is for the recovery of $20,017.58, manufacturers' excise tax, paid under the provisions of sections 900 of the Revenue Acts of 1918 and 1921 and section 600 of the Revenue Act of 1924, with interest.

The defendant demurs to the petition upon the ground that it does not present a cause of action within the jurisdiction of this court.

The plaintiff, an Illinois corporation with offices at Chicago, is engaged in the manufacture and sale of ignition coils. For the purpose of this demurrer it is admitted that the ignition coils upon the sale of which the excise tax was collected, were not at the time of the sale, or at any other time, primarily adapted for use only in automobiles, that they were not automobile parts or automobile accessories.

For the period February 24, 1919, to February 26, 1926, inclusive, the plaintiff, pursuant to the requirements of the Commissioner, filed monthly lists of sales of ignition coils and, in order to avoid the imposition of penalties against it and distraint of its property, paid to the collector at Chicago the manufacturers' excise-tax levy on the sale of automobile parts or accessories by the statute mentioned, the total amount of such tax paid for the period mentioned being $68,867.22.

May 11, 1923, plaintiff filed a claim for refund of $48,080.83, the amount of tax paid for the period February 24, 1919, to March 31, 1923. March 25, 1925, it filed a claim for the refund of $15,363.79, being the tax paid for the period April 1, 1923, to December 31, 1924. September 15, 1926, it filed a third claim for refund of $5,051.46, being the tax paid for the period January 1, 1925, to February 26, 1926.

22 December 10, 1928, the Commissioner of Internal Revenue allowed the first claim, May 11, 1923, in the amount of $46,758.53, which he paid to plaintiff by check in the amount of $68,241.58, including interest as provided by law. He rejected the claim in the amount of $1,322.30, being that portion of the tax for the period February 24 to April 30, 1919, which was not borne by plaintiff but was billed to its customers.

December 13, 1928, the Commissioner allowed the second claim filed March 25, 1925, for $768.76 and on December 19, 1928, a refund check for $1,023.08, which included interest in the amount of $254.30, was delivered to plaintiff. The amount so refunded upon this claim was for the tax paid by plaintiff on account of sales during the month of April 1923. No action has been taken by the Commissioner upon this claim for other monthly periods embraced therein.

November 22, 1928, the Commissioner rejected the last claim filed on September 15, 1926, because plaintiff declined to give a bond conditioned upon the return to the Government of such amount of the tax refunded as was not distributed among the persons who purchased the articles for consumption upon which the sale of the tax was imposed.

The plaintiff paid from its own funds without any reimbursement whatever from any source all of the excise tax, amounting to $68,867.22, for the period February 24, 1919, to February 26, 1926, with the exception of $1,322.30, which the plaintiff added to its invoices and billed to its customers. A considerable portion of the tax, amounting to $1,332.30, the exact amount being unknown, was deducted by plaintiff's customers from invoices rendered when they made payments to plaintiff, and such amounts were never collected by the plaintiff. After plaintiff had followed the practice of adding the tax to the sales price of its ignition coils for about three months it ceased to add the tax to the purchase price or otherwise pass it on to the purchaser of the articles and no longer attempted to collect it from its customers, but the tax was wholly absorbed and paid by the plaintiff, month by month, from its own funds without reimbursement from any source. No portion of the said amount of $1,322.30 is sought to be recovered in this suit.

Defendant insists, in support of the demurrer, that, under section 424 of the Revenue Act of 1928, the court is without jurisdiction, because the suit was instituted after April 30, 1928; that the plaintiff's right to refund is within the discretion of the Commissioner; and that it has not established to his satisfaction that the tax for the period in question was in excess of the amount properly payable and that it does not appear that plaintiff has executed a bond as provided by paragraph 3 of subsection (a) of section 424. Defendant overlooks the fact that the section provides that a refund may be made without a bond if it is shown that the tax was wholly borne and paid by the manufacturer. In such case no bond is necessary under subsection (a) (3).

The plaintiff insists that this section did not make the question whether it was entitled to a refund of excise taxes paid discretionary with the Commissioner of Internal Revenue, nor did it require the filing of a bond if the tax was wholly borne and paid by the manufacturer without reimbursement from the purchaser of the
23 article upon the sale of which the tax was imposed; that if the section makes its right of recovery depend upon the institution of suit prior to April 30, 1928, the section is in violation of the fifth and fourteenth amendments to the Constitution.

For the reasons stated by the court in its opinion in Boyle Valve Company v. The United States, K-66, this date decided, we are of opinion that the defendant's demurrer in this case is not well taken and should be overruled. It is so ordered.

WILLIAMS, Judge; GREEN, Judge; GRAHAM, Judge; and BOOTH, Chief Justice, concur.

IV. *General traverse—Filed March 1, 1930*

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

CHARLES P. SISSON,
Assistant Attorney General.

24 V. *Defendant's counterclaim, filed September 17, 1930, by leave of court*

The United States, the defendant in the above-entitled case, as grounds for counterclaim against the plaintiff in said action, states:

That the plaintiff is a corporation organized and doing business under the laws of the State of Illinois.

That the plaintiff, from February 1919 to December 1924, inclusive, was engaged in the manufacture and sale of ignition coils which were manufactured for and adapted to the special purpose of being used as or to replace component parts of passenger automobiles and automobile trucks.

That the plaintiff, because of said manufacture and sale, filed excise-tax returns monthly for the taxable periods February 1919 to March 1923, inclusive, showing the amount of tax due thereon
25 which was duly assessed on such returns by the Commissioner of Internal Revenue, and paid by plaintiff to the Collector of Internal Revenue at Chicago, Illinois, in the total sum of $48,080.83 under the provisions of section 900 of the Revenue Acts of 1918 and 1921.

That plaintiff likewise made and filed excise-tax returns monthly for the taxable periods April 1923 to December 1924, inclusive, showing the amount of tax due thereon, which was duly assessed on such returns by the Commissioner of Internal Revenue, and paid by plaintiff to the Collector of Internal Revenue at Chicago,

Illinois, in the total amount of $15,734.93 under the provisions of section 900 of the Revenue Act of 1921 and section 600 of the Revenue Act of 1924.

That none of the articles with respect to which the taxes aforesaid were assessed and paid were sold to the manufacturer of automobile trucks or other automobiles.

That on or about November 28, 1928, the Commissioner of Internal Revenue, acting under the erroneous impression that as a matter of law the manufacture and sale of ignition coils were not subject to excise taxes under the provisions of the aforesaid revenue acts and under the erroneous understanding of the facts induced by plaintiff, and with the mistaken belief that the amount of said taxes had not been passed on to the purchasers of the articles in question erro-
26 neously ordered to be refunded to plaintiff of the aforesaid taxes of $48,080.83 the sum of $46,758.53, together with interest amounting to $21,483.05 which total amount of $68,241.58 was wrongfully paid to the plaintiff out of moneys in the Treasury of the United States on December 7, 1928.

That the Commissioner of Internal Revenue on November 30, 1928, because of errors as aforesaid, ordered the refund to plaintiff of $786.76 of said excise taxes paid for the period April 1923, together with interest thereon amounting to $254.32, which total amount of $1,023.08 was wrongfully paid to plaintiff out of moneys in the Treasury of the United States on December 19, 1928.

Wherefore, by reason of the premises recited herein, plaintiff is indebted to the United States in the sum of $69,264.66, with interest at the rate of 6% per annum upon the sum of $68,241.58 from December 7, 1928, and on the sum of $1,023.08 from December 19, 1928, for which the defendant prays judgment against the plaintiff, with costs.

Respectfully submitted.

CHARLES B. RUGG,
Assistant Attorney General.

RALPH C. WILLIAMSON,
Attorney.

27 VI. *Change of attorneys of record*

The petition in this case was filed by Chester A. Gwinn, Esq., as attorney of record.

On December 31, 1931, Mr. Gwinn withdrew his appearance as attorney of record.

On the same date Adrian C. Humphreys, Esq., filed a power attorney from the plaintiff, and was entered as attorney of record.

VI. *Argument and submission of case*

On May 9, 1932, this case was argued and submitted on merits by Mr. Robert N. Anderson, for the plaintiff, and by Mr. Ralph C. Williamson, for the defendant.

28 VII. *Special findings of fact, conclusion of law and opinion of the court by Whaley, J.—Filed March 13, 1933*

Mr. Robert N. Anderson, for the plaintiff. Messrs. Adrian C. Humphreys, George P. McCabe, and Charles J. Tressler were on the briefs.

Mr. Ralph C. Williamson with whom was Mr. Assistant Attorney General Charles B. Rugg for the defendant.

This case having been heard by the Court of Claims, the court, upon the evidence and the report of a commissioner, makes the following

Special findings of fact

1. Plaintiff is a corporation organized under the laws of the State of Illinois and is principal office is in Chicago in that State.

2. During the period beginning May 1919, to but not including March 1926, plaintiff sold ignition coils, manufactured by it, hereinafter more fully described, and beginning June 20, 1919, and ending April 21, 1926, periodically paid to the defendant excise taxes thereon, aggregating $67,544.87, for the periods, in the amounts and on the dates, as follows:

Taxable period	Date of payment	Amount	Taxable period	Date of payment	Amount
May 1919	June 20, 1919	$884.88	November 1922	December 19, 1922	$1,006.35
June 1919	August 5, 1919	1,156.50	December 1922	January 23, 1923	451.20
July 1919	September 5, 1919	1,284.77	January 1923	February 21, 1923	654.61
August 1919	October 8, 1919	1,624.27	February 1923	March 31, 1923	508.07
September 1919	November 4, 1919	1,597.15	29 March 1923	April 14, 1923	622.79
October 1919	December 3, 1919	1,707.84	April 1923	May 25, 1923	768.76
November 1919	January 6, 1920	1,140.59	May 1923	June 19, 1923	1,026.41
December 1919	February 9, 1920	675.31	June 1923	July 25, 1923	1,215.83
January 1920	March 8, 1920	1,048.35	July 1923	August 28, 1923	1,236.90
February 1920	April 6, 1920	1,030.42	August 1923	September 24, 1923	1,261.62
March 1920	June 30, 1920	1,285.28	September 1923	October 17, 1923	1,072.46
April 1920	June 30, 1920	1,116.95	October 1923	November 21, 1923	1,049.54
May 1920	July 2, 1920	962.54	November 1923	December 22, 1923	704.99
June 1920	July 30, 1920	1,606.55	December 1923	February 6, 1924	655.80
July 1920	August 25, 1920	1,669.69	January 1924	February 26, 1924	649.99
August 1920	September 25, 1920	1,374.32	February 1924	March 26, 1924	394.61
September 1920	October 30, 1920	891.51	March 1924	April 21, 1924	584.20
October 1920	December 2, 1920	1,119.21	April 1924	May 20, 1924	760.58
November 1920	January 11, 1921	800.58	May 1924	June 11, 1924	678.76
December 1920	January 31, 1921	191.75	June 1924	July 23, 1924	758.98
January 1921	March 2, 1921	585.86	July 1924	August 19, 1924	634.03
February 1921	April 7, 1921	467.67	August 1924	September 23, 1924	546.96
March 1921	April 19, 1921	883.99	September 1924	October 10, 1924	505.44
April 1921	June 29, 1921	1,025.43	October 1924	November 20, 1924	521.34
May 1921	July 13, 1921	1,050.58	November 1924	December 24, 1924	354.04
June 1921	August 3, 1921	1,221.50	December 1924	January 19, 1925	323.59
July 1921	September 22, 1921	1,110.30	January 1925	February 16, 1925	371.07
August 1921	September 28, 1921	1,527.82	February 1925	March 25, 1925	356.68
September 1921	October 21, 1921	1,238.18	March 1925	April 10, 1925	366.60
October 1921	November 18, 1921	778.30	April 1925	May 14, 1925	425.70
November 1921	December 28, 1921	474.13	May 1925	June 27, 1925	434.39
December 1921	January 18, 1922	265.33	June 1925	July 15, 1925	442.58
January 1922	Feburary 15, 1922	643.19	July 1925	August 17, 1925	470.98
February 1922	March 27, 1922	356.52	August 1925	September 18, 1925	496.31
March 1922	April 18, 1922	514.13	September 1925	October 15, 1925	388.83
April 1922	May 10, 1922	630.33	October 1925	November 27, 1925	408.07
May 1922	June 28, 1922	1,265.28	November 1925	December 21, 1925	233.31
June 1922	July 26, 1922	1,265.04	December 1925	January 22, 1926	204.11
August 1922	August 25, 1922	1,493.94	January 1926	February 25, 1926	311.28
August 1922	September 25, 1922	1,429.10	February 1926	April 21, 1926	141.50
September 1922	October 25, 1922	1,186.95			
October 1922	December 1, 1922	933.36	Total		67,544.87

3. On May 28, 1923, plaintiff filed with the appropriate collector of internal revenue a claim for refund of excise taxes paid May 31, 1919, and June 10, 1919, and of the aforesaid taxes paid June 20, 1919, to April 14, 1923, inclusive, amounting in the aggregate to $48,080.83, for the period beginning March 1919, and ending in March 1923, on the ground that its ignition coils were not parts for automobiles or motor cycles within the meaning of the excise tax laws. The Commissioner of Internal Revenue September 26, 1923, rejected the claim in full. Thereafter, on new evidence, the commissioner reopened and reconsidered the claim and allowed $46,758.53 on or about November 28, 1928, holding to his former rejection to the extent of $1,322.30 on the ground that it represented tax passed on to customers. Said $1,322.30 was for the months of March and April 1919, and no part of same is sought to be recovered in this suit.

4. On March 25, 1925, plaintiff filed with said collector claim for refund of $15,363.79, later amended to $15,734.93, being so much of the aforesaid taxes as was paid beginning May 25, 1923, and ending January 19, 1925, for the period April 1923 to December 1924, inclusive, on the same ground as for claim described in Finding 3, *supra*. The claim was at first rejected, January 15, 1926, subject to reconsideration in the advent of an adverse decision by the courts in a similar case. The commissioner reopened and reconsidered the claim on new evidence and on or about November 30, 1928, allowed $768.76, being the tax paid May 25, 1923, for the month of April 1923, and held to his rejection of the balance, viz, $14,966.17, on the ground that said balance of $14,966.17 had been passed on to customers without refund and that bond specified in Treasury Decision 4195 had not been furnished.

5. On September 15, 1926, plaintiff filed with the appropriate collector claim for refund of $5,051.46, being approximately the balance of the aforesaid taxes paid beginning February 16, 1925, and ending April 21, 1926, for the period January 1925 to February 1926, inclusive, the exact amount of which was $5,051.41, the ground being the same as stated in the case of the two previous claims. The claim was rejected by the commissioner June 24, 1927, for lack of evidence, and on November 22, 1928, on reopening and reconsideration of new evidence, the rejection was adhered to, the ground thereof being that the tax had been passed on to customers, without refund, and without submission of bond specified in Treasury Decision 4195.

6. There has been paid to plaintiff by the defendant, on the aforesaid claims for refund, the following amounts, with interest as indicated:

Refund claims	Allowed and paid		Rejected and unpaid
	Tax	Interest	
[1] $46,758.53	$46,758.53	$21,483.05	
15,734.93	768.76	254.32	$14,966.17
[2] 5,051.41			5,051.41
67,544.87	47,527.29	21,737.37	20,017.58

[1] $48,080.83 less $1,322.30 not sued for.
[2] $5,051.46 less 5 cents error.

Plaintiff sues for recovery of the sum of $20,017.58, the unpaid portion of the refund claims, with interest, and defendant counterclaims the amounts paid thereon, $47,527.29 tax and $21,737.37 interest, total $69,264.66, with interest.

7. For the taxable period in question, viz., May 1919 to the end of February 1926 plaintiff, in the sale of ignition coils, invoiced its catalogue prices to all customers, and did not add thereto any amounts representing excise taxes, or collect from its customers amounts additional to the catalogue prices. The catalogue prices so invoiced and collected, were transferred by plaintiff to its general ledger account in totals without separation into any elements, such as tax, charges for parcel post, insurance. The excise tax which it considered payable was set up in an additional account styled "Excise Tax Expense."

8. For a part of the taxable periods in question plaintiff made on its invoices to customers certain notations with respect to the excise tax which it considered applicable.

Up to May 19, 1923, plaintiff made no such notations on its invoices to customers.

Beginning May 19, 1923, up to December 29, 1925, it was plaintiff's practice to note on its invoices to customers the following: "On automotive accessories 1/21 of amount indicated herein equals 5% excise tax. 20/21st of amount indicated equal price," during the period when the 5% tax rate was in effect, and substantially the same notation during the period when the 2½% rate was in effect, "1/21" being changed to "1/41" and "20/21" to "40/41." It does not definitely appear what the practice was thereafter as to notations on invoices.

9. Plaintiff's catalogue prices were not increased or decreased by reason of the imposition of the excise tax on automobile parts or accessories.

10. It is not possible from the state of the record to determine the amount of excise tax paid for the period when plaintiff made the aforesaid tax notations on invoices sent to its customers.

11. The ignition coil is a form of transformer and is a device that takes a low voltage, relatively high amperage current, and
31 transforms it to a high voltage, relatively low amperage current, the resulting voltage being sufficiently high to bridge

the spark gap of the spark plug, thereby supplying the flame which ignites the gas in the cylinder of an internal-combustion engine.

Ignition coils were in use before the advent of the automobile and are a development from an invention many years ago by Ruhmkorff. Ignition coils were first generally used in automobiles about the year 1914 when they were substituted for the magneto, and batteries came into use for the lighting system. They were not specially designed for automobiles. Prior to such automobile use the coil was being used for stationary internal-combustion engines; also for motorcycles, and marine works.

Plaintiff sold the ignition coils, manufactured by it and involved in this suit, for the most part to jobbers and distributors, and did not know for what special purpose such coils were to be used. Some were sold to manufacturers, wholesalers, mail-order houses, and dealers. None of its coils were sold for original equipment.

The fundamental part of the ignition coil is its internal construction and is the same for any internal-combustion engine. The coil must be held or mounted in position and for that purpose plaintiff manufactured and sold brackets. The brackets were sold and went out from the factory separately from the coils.

Plaintiff made 15 or 20 different kinds of ignition coils, and they were interchangeable between different types of gas engines, depending upon the size and compactness. The adaptability depended upon the bracket, lead wires, and such things, and not upon the internal construction of the coil.

Plaintiff's ignition coils were equally adapted to marine, automotive, tractor, truck, motorcycle, or airplane engines, and to outboard motors and engines for concrete mixers. They were manufactured and sold for general use and were not primarily adapted or specially designed for use as a component of automobiles, motorcycles, automobile trucks, or automobile wagons.

Conclusion of law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that plaintiff is entitled to recover $20,017.58, with interest, and that defendant is not entitled to recover on its counterclaim.

It is therefore adjudged and ordered that plaintiff recover of and from the United States the sum of twenty thousand seventeen dollars and fifty-eight cents ($20,017.58), with interest thereon as provided by law, and that the counterclaim be dismissed.

Opinion

Whaley, Judge, delivered the opinion of the court:

The plaintiff brings this suit to recover excise taxes in the sum of $20,017.58 collected on ignition coils manufactured and sold by

it for the taxable period May 1923 to February 1926 inclusive. The sum sued for is the balance on a claim for refund of $67,544.87, the defendant having refunded $47,527.29 with interest. A
32 counterclaim has been filed by the defendant to recover the amount so refunded. The only question involved is whether ignition coils manufactured and sold by the plaintiff were subject to tax as automobile parts or accessories under section 900 of the revenue acts of 1918 and 1921 and section 600 of the Revenue Act of 1924, 40 Stat. 1057, 1122, 42 Stat. 227, 291, 43 Stat. 253, 323.

The facts in this case are similar in most respects to those in the case of Atwater Kent Manufacturing Company, 62 C.Cls. 419, in which the plaintiff was permitted to recover. We can find no difference in principle between these cases. All of plaintiff's sales of ignition coils were taxed whether they were advertised for use on automobiles or not; the entire amount of excise tax paid during the period involved has been proved; none of plaintiff's ignition coils were especially adapted for use in automobiles; none of plaintiff's ignition coils were sold by plaintiff to automobile manufacturers, dealers, or owners for use on automobiles; all of plaintiff's ignition coils were equally adapted for use on any internal-combustion engine, and as the plaintiff sold to wholesalers, jobbers, mail-order houses and dealers, and as their use was general in any kind of internal-combustion engine, it was not within plaintiff's knowledge to what particular use they were put.

The ignition coils were not specially designed for or primarily adaptable to automobiles and therefore are not within the provisions of the statute and regulations. See Wells Manufacturing Company v. The United States, 66 C.Cls. 283; Milwaukee Motor Products, Inc. v. The United States, 66 C.Cls. 295.

The plaintiff is entitled to recover. The counterclaim is dismissed. It is so ordered.

Williams, Judge; Littleton, Judge; and Green, Judge, concur.

Booth, Chief Justice, took no part in the decision of this case on account of illness.

33 VIII. *Judgment*

At a Court of Claims held in the city of Washington on the 13th day of March, A. D. 1933, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that plaintiff is entitled to recover.

It is adjudged and ordered that the plaintiff recover of and from the United States the sum of twenty thousand seventeen dollars and fifty-eight cents ($20,017.58), with interest thereon as provided by law, and that the counterclaim be dismissed.

34 [Clerk's certificate to foregoing transcript omitted in printing.]

35 [Endorsement on cover:] File No. 37774, Court of Claims, Term No. 171, The United States, petitioner, vs. Jefferson Electric Manufacturing Company. Petition for a writ of certiorari and exhibit thereto. Filed June 13, 1933. File No. 171 O. T. 1933.

U. S. GOVERNMENT PRINTING OFFICE: 1933

Supreme Court of the United States

Order allowing certiorari

Filed October 9, 1933

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

16383—33

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CITATIONS

Cases:	
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Graham & Foster v. *Goodcell*, 282 U.S. 409	7
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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. ——

JEFFERSON ELECTRIC MANUFACTURING COMPANY

v.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General on behalf of the United States prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above case on March 13, 1933.

OPINIONS BELOW

The opinion of the Court of Claims on demurrer is reported in 69 C.Cls. 150. The opinion of the Court of Claims on the merits is not reported.

JURISDICTION

The judgment of the Court of Claims was entered on March 13, 1933. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

I. Whether respondent may recover manufacturers' excise tax paid under the provisions of Sec-

tions 900 of the Revenue Acts of 1918 and 1921, and Section 600 of the Revenue Act of 1924, when such taxes appear to have been collected from respondent's customers and were not proved to have been returned to said customers as provided in Section 424 of the Revenue Act of 1928.

II. Whether under Section 424 of the Revenue Act of 1928 the court below had jurisdiction to enter a judgment for the refund of manufacturers' excise taxes when it appeared that it was not established to the satisfaction of the Commissioner of Internal Revenue that said taxes had not been collected directly or indirectly from respondent's customers, or that said taxes had been returned to respondent's customers.

III. Whether the Court of Claims followed permissible practice in making an ultimate finding of fact that the ignition coils manufactured and sold by the respondent were not primarily adapted, or specially designed for use in automobiles, motorcycles, automobile trucks or automobile wagons within the meaning of the applicable taxing statutes.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved appear in Appendix A, *infra,* pp. 12–14.

STATEMENT

During the period beginning June 20, 1919, and ending April 21, 1926, respondent paid excise taxes aggregating $67,544.87 on ignition coils manufactured and sold by it (Finding 2).

Ignition coils were in use before the advent of the automobile, being used for stationary internal-combustion engines, and also for motorcycles and marine works (Finding 11). They were not specially designed for automobiles and were first generally used for that purpose about the year 1914. (Finding 11).

Respondent sold its ignition coils involved in this suit for the most part to jobbers and distributors and did not know for what special purpose the coils were to be used (Finding 11). Some of the coils were sold to manufacturers, wholesalers, mail-order houses, and dealers but none were sold for original equipment (Finding 11). The adaptability of ignition coils for special engines did not depend upon the internal construction of the coil. (Finding 11). Respondent manufactured 15 or 20 different kinds of ignition coils (Finding 11).

Respondent's ignition coils were equally adapted to marine, automotive, tractor, truck, motorcycle, or airplane engines and to outboard motors and engines for concrete mixers and were not primarily adapted or specially designed for use as a component of automobiles, motorcycles, automobile trucks, or automobile wagons.[1]

Beginning May 19, 1923, and up to December 29, 1925, it was respondent's practice to note on its invoices to customers that 1/21 of the amount paid by customers equalled 5 per cent excise tax

[1] To this finding the Government has made certain objections, which appear in the body of the petition.

and that 20/21 indicated the purchase price (Finding 8). During that part of this period when a 2½ per cent rate was applicable the notations were 1/41 and 40/41 (Finding 8). It is not possible from the state of the record to determine the amount of excise tax paid for the period when respondent made the above notations on its invoices sent customers (Finding 10). At no time were respondent's catalogue prices increased or decreased by reason of the imposition of the excise tax (Finding 9). Prior to the period when respondent noted its invoices as indicated above, respondent did not add any amounts to the catalogue prices and did not collect any amounts additional to the catalogue prices because of the excise taxes (Finding 7). The catalogue prices collected were transferred to respondent's general ledger account without any separation into various elements, but the excise tax was set up in an additional account called "Excise Tax Expense" (Finding 7).

On May 28, 1923, respondent filed a claim for refund of excise taxes paid for the period beginning March 1919 and ending March 1923 in the amount of $48,080.83 (Finding 3). After having once rejected the claim in full, the Commissioner of Internal Revenue, on or about November 28, 1928, allowed the claim in the amount of $46,758.53 and rejected it to the extent of $1,322.30 on the ground that the latter amount represented tax passed on to respondent's customers (Finding 3).

On March 25, 1925, respondent filed a claim for refund of excise taxes for the period April 1923 through December 1924 in the amount of $15,363.79 (Finding 4). After having first rejected the claim in full the Commissioner of Internal Revenue, on or about November 30, 1928, allowed the claim in the amount of $768.76 and rejected it in the amount of $14,966.17 on the ground that the latter amount had been passed on to respondent's customers and that respondent had not filed the required bond (Finding 4).

On September 15, 1926, respondent filed a claim for refund of excise taxes for the period January 1925 through February 1926 for the amount of $5,051.41 (Finding 5). On November 22, 1928, the Commissioner rejected claim for refund on the ground that the amount thereof represented taxes passed on to respondent's customers and that respondent had not submitted the specified bond (Finding 5).

Respondent sought to recover the sum of $20,017.58, with interest, and the defendant counterclaimed for the amount of the refunds already paid, namely, $47,527.29, plus $21,737.37 interest (Finding 6).

After having overruled a demurrer to the petition the Court of Claims gave judgment for the respondent in the sum of $20,017.58 and dismissed the counterclaim.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In holding that respondent was entitled to recover manufacturers' excise taxes paid under Sections 900 of the Revenue Acts of 1918 and 1921, and Section 600 of the Revenue Act of 1924, when respondent had not proved that said taxes were not collected directly or indirectly from respondent's customers or, if so collected, that they were returned to respondent's customers.

2. In holding that the court had jurisdiction to give judgment for the respondent, although it affirmatively appeared that respondent had not established its right to a refund to the satisfaction of the Commissioner of Internal Revenue as provided in Section 424 of the Revenue Act of 1928.

3. In finding that respondent's ignition coils were not primarily adapted or specially designed for use in automobiles, motorcycles, automobile trucks, or automobile wagons.

4. In dismissing the petitioner's counterclaim and giving judgment for respondent.

REASONS FOR GRANTING THE WRIT

(1) In giving judgment for respondent solely on the ground that the ignition coils manufactured and sold by petitioner were not primarily adapted or specially designed for automobiles within the meaning of the taxing statute, the court below disregarded the provisions of Section 424 of the Revenue Act of 1928 which require a taxpayer, in

order to secure a refund of such taxes, to show that they were not collected directly or indirectly from the purchaser or lessee, or, if they were so collected from the purchaser or lessee, they were returned to him. The purpose of Section 424 of the Revenue Act of 1928 was to prevent the refund of excise taxes to a manufacturer when the manufacturer had not paid the tax but had passed it on to the consumer (House Report No. 2, p. 27, 70th Cong., 1st Sess). It wholly defeats the purpose of the statute if the rule laid down by it is not to apply in judicial proceedings as well as in administrative proceedings. Cf. *Graham & Foster* v. *Goodcell,* 282 U.S. 409, 424. The court below did not find specifically whether the taxes in question had been collected directly or indirectly from respondent's purchasers or whether if so collected they had been returned to them, and we think that respondent did not offer proof to support such a finding. It appears that during most of the period out of which respondent's claims arise, it was respondent's practice to note on its invoices to customers that 1/21 was for excise tax, and that 20/21 indicated the purchase price (Finding 8). This is the most affirmative finding on the subject and seems clearly to indicate that the taxes were collected from respondent's customers. While it is true that respondent's catalogue prices were not increased or decreased by reason of the imposition of the excise tax, yet that fact does not show that the tax was

returned to respondent's customers. We are aware of only one decision commenting upon a similar situation, and it was there held that an arrangement such as used by respondent in this case resulted in the taxes being wholly returned to the customers. *American Chain Co.* v. *Eaton,* 58 F. (2d) 248, 249 (D.C. Conn.), reversed on other grounds, *Eaton* v. *American Chain Co.,* 63 F. (2d) 783, (C.C.A. 2d). We do not share the view of the District Court that such a conclusion may be drawn from this method of paying the tax.

Respondent has failed to prove the facts required by Section 424 and is therefore not entitled to recover. The judgment of the court below defeats the purpose of the statute by allowing respondent to recover taxes which respondent has failed to prove were not paid by its customers.

Numerous cases involving refund of manufacturers' excise taxes under the statutes involved in this case are pending in the courts, and the question whether a taxpayer must prove not only the illegality of the tax but also that the tax has not been passed on to its customers is of great importance. In addition it seems that the question presented, or one very similar to it, can arise under the provisions for the refunding of manufacturers' excise taxes in the Revenue Act of 1932. Revenue Act of 1932, c. 209, Sec. 621, 47 Stat. 169, 267–268.

(2) In holding that there was jurisdiction to give a judgment for respondent, although it af-

firmatively appears that respondent had not proved to the satisfaction of the Commissioner of Internal Revenue that it was entitled to the refund, the court disregarded the plain provisions of Section 424 of the Revenue Act of 1928. That section provides that no refund of the manufacturers' excise taxes in question shall be made unless pursuant to a judgment of a court in an action instituted prior to April 30, 1928, or unless the taxpayer proves to the satisfaction of the Commissioner of Internal Revenue that the tax was not collected directly or indirectly from the purchaser or lessee, or if so collected that it was returned to the purchaser or lessee. It was clearly competent for the Congress to provide that it should be within the discretion of the Commissioner of Internal Revenue to make these refunds. Cf. *Williamsport Wire Rope Company* v. *United States,* 277 U.S. 551. The question presented was decided adversely to the contention of the Government in *Boyle Valve Co.* v. *United States,* 69 C.Cls. 129, and by a majority of the Circuit Court of Appeals for the Third Circuit in *McCaughn* v. *Electric Storage Battery Co.,* 63 F. (2d) 715, (C.C.A. 3d).

In *America Chain Co.* v. *Eaton, supra,* the District Court seems to have decided this question against the Government. The Circuit Court of Appeals did not pass upon it.

In *Routzahn* v. *Willard Storage Battery Co.,* decided May 9, 1933, 1933 P.-H. Tax Service p. 1577, the Circuit Court of Appeals for the Sixth Circuit

seems to have held that in an action against the Collector the question presented does not arise until after judicial determination of the legality of the tax.[2]

(3) The ultimate finding of the court below is not simply a statement of facts from which a legal result may follow, but, in effect, it states that the facts of the present case are such as to place the respondent's ignition coils outside the legal definition of parts and accessories laid down by this Court in *Universal Battery Co.* v. *United States,* 281 U.S. 580, 583-584. The finding answers the only legal issue involved in this branch of the case. While it is true that the findings of the Court of Claims are generally conclusive, and while there is generally no necessity for that court to support its findings by an exposition of the underlying circumstantial facts, it is not believed that those rules should permit the Court of Claims to make an ultimate finding which will conclude the parties as to the only legal issue involved when that finding is isolated and unsupported by any other facts the court has found. In the present case there was evidence before the court appearing in the report of the Commissioner of the Court of Claims that the respondent advertised its ignition coils as primarily adapted for use in automobiles. The transcript of

[2] Two decisions of the District Courts seem to support the contentions of the Government. *Twentieth Century Mfg. Co.* v. *Hopkins*, X-2 Cum. Bul. 408 (N.D. Texas); *Sterling Spring Co.* v. *Routzahn*, VIII-2 Cum. Bul. 358 (N.D. Ohio).

the Commissioner's report in this respect is set out in Appendix B, *infra,* pp. 15–16. The Court of Claims has in other cases recognized the importance of facts relating to advertising in the determination of whether particular products are parts or accessories within the meaning of the taxing statutes. See *Cole Storage Battery Co.* v. *United States,* 65 C.Cls. 164, certiorari denied, 278 U.S. 641; *Perfection Gear Co.* v. *United States,* 70 C.Cls. 422; *Edison Storage Battery Co.* v. *United States,* 67 C.Cls 543, 555. The Government is filing in connection with this petition a motion to remand the cause to the Court of Claims with directions to make additional findings with respect to respondent's advertising as a material fact in the determination of whether respondent's ignition coils were taxable as parts or accessories within the meaning of the taxing statutes.

Wherefore, it is respectfully submitted that the petition should be granted.

J. CRAWFORD BIGGS,
Solicitor General.

JUNE 1933.

APPENDIX A

Section 900 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1122, provides in part as follows:

> That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—
>
> (1) Automobile trucks and automobile wagons, (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;
>
> (2) Other automobiles and motorcycles, (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof) except tractors, 5 per centum;
>
> (3) Tires, inner tubes, parts, or accessories, for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum;
>
> * * * * *

The pertinent sections of the Revenue Acts of 1921 and 1924 are the same in so far as they relate to the issues of this case. Revenue Act of 1921, c. 136, Sec. 900, 42 Stat. 227, 291; Revenue Act of 1924, c. 234, Sec. 600, 43 Stat. 253, 322–323.

The pertinent provisions of Regulations No. 47, promulgated May 1, 1919, are as follows:

> ART. 15. *Definition of parts.*—A "part" for an automobile truck, automobile wagon,

> other automobile, or motorcycle is any article designed or manufactured for the special purpose of being used as or to replace a component part of any such vehicle, and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use, and which is primarily adaptable only for use as a component part of such vehicle. Mere stock or commercial commodities, such as bolts, nuts, washers, screws, though used as components for such vehicles, are not "parts" within the meaning of subsection (3) of section 900. Articles, however, which ordinarily would be classed as commercial commodities become parts when, because of their design or construction, they are primarily adaptable for use as component parts of such vehicles. Component parts of articles taxable under this definition are taxable when sold separately, if they have reached such stage of manufacture that they are primarily adaptable for use as such a component part. * * *

The parts quoted of the above Regulations were continued without material changes in Revised Regulations issued under the Revenue Acts of 1921 and 1924. Reg. 47, Art. 15 (1921); Reg. 47, Art 16 (1924).

Section 424 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 866 provides in part as follows:

> SEC. 424. *Refund of Automobile Accessories Tax.*
>
> (a) No refund shall be made of any amount paid by or collected from any manufacturer, producer, or importer in respect of the tax imposed by subdivision (3) of section 600 of the Revenue Act of 1924, or

subdivision (3) of section 900 of the Revenue Act of 1921 or of the Revenue Act of 1918, unless either—

(1) Pursuant to a judgment of a court in an action duly begun prior to April 30, 1928; or

(2) It is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of an article subject to tax, or that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him; or

(3) The Commissioner certifies to the proper disbursing officer that such manufacturer, producer, or importer has filed with the Commissioner, under regulations prescribed by the Commissioner with the approval of the Secretary, a bond in such sum and with such sureties as the Commissioner deems necessary, conditioned upon the immediate repayment to the United States of such portion of the amount refunded as is not distributed by such manufacturer, producer, or importer, within six months after the date of the payment of the refund, to the persons who purchased for purposes of consumption (whether from such manufacturer, producer, importer, or from any other person) the articles in respect of which the refund is made, as evidenced by the affidavits (in such form and containing such statements as the Commissioner may prescribe) of such purchasers, and that such bond, in the case of a claim allowed after February 28, 1927, was filed before the allowance of the claim by the Commissioner.

* * * * *

APPENDIX B

With respect to respondent's advertising, the Commissioner reported to the Court of Claims as follows (p. 2, 3):

It [respondent] did, however, manufacture and sell several types of ignition coils which it very generally advertised as:

"Genuine Jefferson automobile ignition coils interchangeable with any of the standard battery ignition systems."

The plaintiff further advertised:

"The Jefferson line of automobile ignition coils consists of only a few types, which offer an exact replacement for any of the coils used as standard equipment. The coils are sufficiently flexible through the use of interchangeable fittings, adjustable caps and terminals, to enable one type of coil to be used to replace many of the different coils now in general use."

During the period involved herein it published and distributed charts describing and illustrating its so-called "Jefferson automobile ignition coils" indicating which of its several models of coils could be used as replacements on practically all makes and models of automobiles, and further specifically designated which of its several types of coils should be used as replacements in connection with the various standard lighting and ignition systems. One of the coils illustrated and described was the "Jefferson emergency automobile ignition coil" which

is illustrated with four types of brackets for mounting. That coil is described as follows:

> "The Jefferson emergency coil, with the three simple adapters supplied with it, makes it an interchangeable or replacement coil on all standard automobile ignition systems. A heavy duty condenser is built into the coil, which can be utilized in the ignition circuit or eliminated, as the particular replacement requires. For 12-volt systems a resistance unit is necessary.
>
> "The installation is very simple. Complete instructions and coil specification list are furnished with each coil."

Another type illustrated and described is the "Jefferson universal automobile ignition coil" which is illustrated with four types of brackets and a resistance unit. That coil is described as follows:

> "The Jefferson universal coil is designed for replacement on all standard battery ignition systems. It is the only ignition coil outfit which is universally adaptable to all standard battery ignition systems. The Jefferson universal coil represents the highest efficiency in coil construction. It is compact, dependable in performance, and very simple to install."

In one of its circulars captioned "Jefferson Automobile Ignition Coils" the replacement chart sheet carries the following heading:

> "The last word in automobile ignition coils. Jefferson coils are the only 100 per cent complete line on the market, and consist of only a few standard types. Our trade-mark identifies genuine Jeffersons—get them from your jobber."

U. S. GOVERNMENT PRINTING OFFICE: 1933

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. —

UNITED STATES, PETITIONER

v.

JEFFERSON ELECTRIC MANUFACTURING COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MOTION OF THE UNITED STATES TO REMAND TO THE COURT OF CLAIMS

Comes now the United States, the petitioner herein, by the Solicitor General, and moves the Court to remand the above-entitled case to the Court of Claims for additional findings of fact as set forth in and for the reasons expressed in the petition for a writ of certiorari filed herewith.

Wherefore, it is respectfully prayed that if this Court is of the opinion that the judgment below should not be affirmed because of the incomplete findings of fact, an order be entered remanding said cause to the Court of Claims for findings upon the facts set forth in the petition for certiorari and upon such further and additional facts, if any, as this Court may deem necessary.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.

JUNE 1933.

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U. S. GOVERNMENT PRINTING OFFICE 1933

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 171

THE UNITED STATES, PETITIONER

v.

JEFFERSON ELECTRIC MANUFACTURING COMPANY

ON A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court below on demurrer (R. 12–14) is reported in 69 C.Cls. 150. The opinion of the court below on the merits (R. 19–20) is reported in 2 F.Supp. 778.

JURISDICTION

The judgment below was entered on March 13, 1933. (R. 20.) The petition for a writ of certiorari was filed June 13, 1933, and was granted October 9, 1933. (R. 21.) The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the respondent may recover manufacturers' excise tax paid under the provisions of Section 900 of the Revenue Acts of 1918 and 1921, and Section 600 of the Revenue Act of 1924, when it did not prove that such taxes were not collected directly or indirectly from its customers, or, if so collected, had been returned to them, as provided in Section 424 of the Revenue Act of 1928.

2. Whether under Section 424 of the Revenue Act of 1928 the court below had jurisdiction to enter a judgment for the refund of manufacturers' excise taxes when it appeared that it was not established to the satisfaction of the Commissioner of Internal Revenue that the taxes had not been collected directly or indirectly from the respondent's customers, or that the taxes had been returned to the respondent's customers.

3. Whether the Court of Claims followed permissible practice in making an ultimate finding of fact that the ignition coils manufactured and sold by the respondent were not primarily adapted or specially designed for use in automobiles, motorcycles, automobile trucks or automobile wagons within the meaning of the applicable taxing statutes.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in Appendix A, *infra*, pp. 26–28.

STATEMENT

The findings of the Court of Claims may be summarized as follows:

During the period beginning June 20, 1919, and ending April 21, 1926, the respondent paid excise taxes aggregating $67,544.87 on ignition coils which it manufactured and sold. (R. 16.)

Ignition coils were in use before the advent of the automobile, being used for stationary internal-combustion engines, and also for motorcycles and marine works. (R. 19.) They were not specially designed for automobiles and were first generally used for that purpose about the year 1914. (R. 19.)

The respondent sold its ignition coils involved in this suit for the most part to jobbers and distributors and did not know for what special purpose the coils were to be used. (R. 19.) Some of the coils were sold to manufacturers, wholesalers, mail-order houses and dealers but none were sold for original equipment. (R. 19.) The adaptability of ignition coils for various engines did not depend upon the internal construction of the coil. (R. 19.) The respondent manufactured 15 or 20 different kinds of ignition coils. (R. 19.)

The respondent's ignition coils were equally adapted to marine, automotive, tractor, truck, motorcycle, or airplane engines and to outboard motors and engines for concrete mixers and were not primarily adapted or specially designed for use as

a component of automobiles, motorcycles, automobile trucks, or automobile wagons. (R. 19.)[1]

Beginning May 19, 1923, and up to December 29, 1925, it was the respondent's practice to note on its invoices to customers that 1/21 of the amount paid by customers represented the 5 percent excise tax and that 20/21 indicated the purchase price. (R. 18.) During that part of this period when a 2½ percent rate was applicable the notations were 1/41 and 40/41. (R. 18.) It is not possible from the state of the record to determine the amount of excise tax paid for the period when the respondent made the above notations on its invoices sent customers. (R. 18.) At no time were the respondent's catalogue prices increased or decreased by reason of the imposition of the excise tax. (R. 18.) Prior to the period when the respondent noted its invoices as indicated above, the respondent did not add any amounts to the catalogue prices and did not collect any amounts additional to the catalogue prices because of the excise taxes. (R. 18.) The catalogue prices collected were transferred to the respondent's general ledger account without any separation into various elements, but the excise tax was set up in an additional account called "Excise Tax Expense." (R. 18.)

On May 28, 1923, the respondent filed a claim for refund of excise taxes paid for the period begin-

[1] To this finding the Government has made certain objections, which appear in Point III of this brief, *infra*, pp. 21–24.

ning March, 1919, and ending March, 1923, in the amount of $48,080.83. (R. 17.) After having once rejected the claim in full, the Commissioner of Internal Revenue, on or about November 28, 1928, allowed the claim in the amount of $46,758.53 and rejected it to the extent of $1,322.30 on the ground that the latter amount represented tax passed on to the respondent's customers. (R. 17.)

On March 25, 1925, the respondent filed a claim for refund of excise taxes for the period April, 1923, through December, 1924, in the amount of $15,363.79. (R. 17.) After having first rejected the claim in full the Commissioner of Internal Revenue, on or about November 30, 1928, allowed the claim in the amount of $768.76 and rejected it in the amount of $14,966.17 on the ground that the latter amount had been passed on to the respondent's customers and that the respondent had not filed the required bond. (R. 17.)

On September 15, 1926, the respondent filed a claim for refund of excise taxes for the period January, 1925, through February, 1926, for the amount of $5,051.41. (R. 17.) On November 22, 1928, the Commissioner rejected this claim for refund on the ground that the amount claimed represented taxes passed on to the respondent's customers and that the respondent had not submitted the specified bond. (R. 17.)

The respondent brought this suit March 25, 1929 (R. 1) to recover the sum of $20,017.58, with in-

terest, and the defendant counterclaimed for the amount of the refunds already paid, namely, $47,527.29, plus $21,737.37 interest. (R. 18.)

After having overruled a demurrer to the petition (R. 14) the Court of Claims gave judgment for the respondent in the sum of $20,017.58, and dismissed the counterclaim. (R. 21.)

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the respondent was entitled to recover manufacturers' excise taxes paid under Section 900 of the Revenue Acts of 1918 and 1921, and Section 600 of the Revenue Act of 1924, when the respondent had not proved that said taxes were not collected directly or indirectly from respondent's customers or, if so collected, that they were returned to respondent's customers.

2. In holding that the court had jurisdiction to give judgment for the respondent, although it affirmatively appeared that respondent had not established its right to a refund to the satisfaction of the Commissioner of Internal Revenue as provided in Section 424 of the Revenue Act of 1928.

3. In finding that respondent's ignition coils were not primarily adapted or specially designed for use in automobiles, motorcycles, automobile trucks, or automobile wagons.

4. In dismissing the petitioner's counterclaim and giving judgment for respondent.

SUMMARY OF ARGUMENT

I

In enacting Section 424(a)(2) of the Revenue Act of 1928 (*infra*, pp. 27–28), Congress intended to prevent the unjust enrichment of manufacturers who had passed automobile parts and accessories excise taxes on to their customers, and therefore provided that refund of such taxes should not be made unless it was shown that the manufacturers had borne the burden of the taxes. The purpose of Congress is frustrated if the rule of the statute is not applicable in judicial proceedings as well as in administrative proceedings.

The invoice system used by the respondent during part of the taxable period indicates that the respondent's purchasers bore the burden of the taxes. The fact that the respondent did not increase the catalogue prices of its products does not show that the respondent bore the burden of the taxes. The respondent has failed to comply with the statute requiring it to prove that it is entitled to recover such taxes.

II

Section 424 (a) (2) requires that it be "established to the satisfaction of the Commissioner" that the manufacturer bore the burden of the tax before refund may be made. A satisfactory interpretation of the meaning of those words, unless they are to be ignored entirely, seems to require the

conclusion that Congress intended to place the making of these particular refunds within the discretion of the Commissioner.

III

The ultimate finding of the court below that the respondent's ignition coils were not primarily adapted or specially designed for use on automobiles is in effect a conclusion that the coils were not parts or accessories within the meaning of the taxing statutes. The finding is not supported by other facts found. The court omitted to find facts in regard to the manner in which the respondent advertised its products. The Government contends that this constituted a material omission and that the case should be remanded for corrected and additional findings of fact.

If it be ultimately determined that the respondent's ignition coils were properly taxable, refunds already made on the ground that such coils were not taxable may be recovered by the United States in the amount of the counterclaim interposed in the court below.

ARGUMENT

I

IN ORDER TO RECOVER IN THIS ACTION THE RESPONDENT WAS REQUIRED TO PROVE THAT IT HAD BORNE THE BURDEN OF THE TAX

Section 424(a)(2) of the Revenue Act of 1928 (*infra*, pp. 27–28), forbids the refund of automobile parts or accessories taxes to a manufacturer unless

it is established to the satisfaction of the Commissioner "that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him; * * *".[2] We contend that the respondent was obliged in this action to make the showing required by Section 424(a)(2) and that the respondent failed to do so.

After having prohibited refunds of automobile accessories taxes except upon conditions admittedly difficult to comply with (Act of February 28, 1927, c. 226, 44 Stat. 1250, 1254)[3] and after having made a study of the situation Congress enacted Section 424 of the 1928 Act. See House Report No. 2, 70th Congress, First Session, p. 27. As shown by that report the Ways and Means Committee believed that these excise taxes were generally passed on to the consumers and that the manufacturers were in most cases nothing but collecting agencies. The

[2] Section 424 prescribes three other conditions upon which such refunds may be made: if pursuant to a judgment of a court in a suit instituted prior to April 30, 1928, or if the amount was an overpayment of tax on an article properly taxable or if the manufacturer has filed a bond to repay such portion of the refund as is not distributed to the purchasers of the articles. The facts presented do not bring the respondent within any of these conditions.

[3] The provision was continued in the Act of December 22, 1927, c. 5, 45 Stat. 2, 30, and in the Act of March 3, 1928, c. 126, 45 Stat. 162, 169. The provision required a bond by the manufacturer, etc., and affidavits of the purchasers, and is very similar to what is now subsection (a) (3) of Section 424 of the 1928 Revenue Act.

report shows clearly that it was the purpose of Congress to allow no refund when the result would be to enrich manufacturers who had not borne the burden of the tax. There is no disagreement among the courts that such was the purpose of Congress. *Boyle Valve Co.* v. *United States,* 69 C. Cls. 129, 134; *Routzahn* v. *Willard Storage Battery Co.,* 65 F. (2d) 89, 93 (C.C.A. 6th), now pending on certiorari, No. 329, present term; *Electric Storage Battery Co.* v. *McCaughn,* 52 F. (2d) 205, 209 (E.D.Pa.), affirmed, *McCaughn* v. *Electric Storage Battery Co.,* 63 F. (2d) 715 (C.C.A. 3d); *American Chain Co.* v. *Eaton,* 58 F. (2d) 248, 255 (D.Conn.), reversed on other grounds, *Eaton* v. *American Chain Co.,* 63 F. (2d) 783 (C.C.A. 2d), now pending on certiorari, No. 196, present term.

The court below gave judgment for the respondent solely on the ground that the ignition coils manufactured and sold by the respondent were not primarily adapted or specially designed for automobiles within the meaning of the taxing statute. In so doing we contend that the court below either disregarded Section 424(a)(2) or was of the opinion that the proof in this case met the requirement of that section.[4] In either case we think the court

[4] The court's decision overruling the Government's demurrer (R. 12–14) did not pass upon the question now under discussion, for the demurrer admitted the allegation in the petition that the respondent had borne the burden of the tax (R. 5). The ruling on the demurrer was made on the authority of *Boyle Valve Co.* v. *United States,* 69 C.Cls.

below erred and that the intent of Congress in enacting Section 424 has not been fulfilled.

In our opinion, the purpose of the statute is wholly defeated if the rule laid down by it is held to be applicable only in administrative proceedings and not in judicial proceedings. Congress intended to prohibit refunds unless the manufacturer had borne the burden of the tax, and the intention is so manifest that we think the words "established to the satisfaction of the Commissioner" in the statute cannot justifiably be used to support a construction limiting the application of the statute to administrative proceedings.[5] The question whether another section of the Revenue Act of 1928, prohibiting refunds upon certain conditions, was limited in its application to administrative action was before this Court in *Graham & Foster* v. *Goodcell*, 282 U.S. 409. It was there contended that Section

129, which was also a decision upon demurrer. But in the *Boyle Valve* case (p. 133) the court seems to have recognized that the taxpayer must "establish to the satisfaction of the court whether he is entitled to a refund under the terms of the act."

[5] If the words "established to the satisfaction of the Commissioner" are to be given particular significance beyond an indication that Congress intended to require strict proof, or, if the words were intended to change in any way the normal method of refunding taxes in these particular circumstances, it seems more reasonable to interpret the words as placing these particular refunds within the discretion of the Commissioner subject to judicial review only in case of abuse of that discretion. The authorities upon this interpretation of Section 424 (a) (2) are set out in Point II of this brief, *infra*, pp. 17–21.

611 of the 1928 Act (c. 852, 45 Stat. 791, 875), providing in effect that taxes paid after the period of limitation should not be refunded where a claim in abatement was filed and collection stayed, did not apply to judicial proceedings. But this Court said, at page 424:

> We are brought back to the fundamental purpose of the statute, and we are unable to conclude that it established one rule for the Department and another for the courts. We think that it was intended to prevent refunds in the circumstances stated and not merely a particular way of getting the money from the Treasury; that the effect of the provision was to deny a right to recover the amount paid and that the provision governs equally wherever the right is asserted.

That reasoning and conclusion, we submit, are applicable here.

In *American Chain Co.* v. *Eaton, supra,* the District Court applied the requirement of the statute in the suit before it but concluded that the plainiff had satisfactorily shown that it had returned the tax to its customers. 58 F. (2d) 249. While we do not agree with the District Court's conclusion as to the sufficiency of the plaintiff's showing in that case, we do think the court was correct in noticing the relevancy of plaintiff's proof that it had borne the burden of the tax. In *Routzahn* v. *Willard Storage Battery Co., supra,* the Circuit Court of Appeals for the Sixth Circuit indicated that after a taxpayer had secured a judgment

against the Collector, no refund could be obtained until the Commissioner had been satisfied that the taxpayer had borne the burden of the tax. The decision recognizes that a taxpayer must submit the proof required by Section 424(a)(2), but in effect concludes that the judgment of the court need not be paid by the Commissioner unless he is satisfied as to the incidence of the tax. The implications of that holding are discussed in Point II of this brief, *infra*, pp. 17–21. In *McCaughn* v. *Electric Storage Battery Co., supra,* the Circuit Court of Appeals for the Third Circuit said that Section 424 "does not purport to contain any provision prescribing conditions under which taxes may be collected by means of a suit". 63 F. (2d) 715, 718. This, we contend, for the reasons above stated, was an erroneous conclusion.[6]

We submit, therefore, that the furtherance of the purpose of Congress in enacting Section 424 demands that the respondent show that the tax was not collected from its purchasers or that, if so collected, it was returned to them, and that if the court below intended to overrule *sub silentio* this contention on the part of the Government, it was in error and the decision should be reversed.

[6] The practical effect of the *Electric Storage Battery* case is the same as that of the *Willard Storage Battery* case for we are advised that the Treasury has withheld payment of the judgment in the *Electric Storage Battery* case and has requested the taxpayer to comply with the provisions of Section 424.

If the decision of the court below was intended to imply that the respondent had submitted proof which satisfactorily fulfilled the requirement of Section 424, we think there was error. The court below did not find specifically whether the taxes in question had been collected directly or indirectly from the respondent's customers or whether, if so collected, they had been returned to them. If we are correct in our contention that the respondent was compelled to make such a showing as a basis for recovery, the court below should have made an ultimate finding of fact with respect to it. *United States* v. *Wells,* 283 U.S. 102. The absence of such an ultimate finding will not defeat recovery if the finding follows from other facts found as a necessary inference and results as a conclusion of law. *Botany Mills* v. *United States,* 278 U.S. 282, 290. But we contend that no such case is presented here and that the facts as found will not support an ultimate finding that the respondent bore the burden of the tax.

The most apposite finding on the subject is, that during the period from May 19, 1923, to December 29, 1925, it was respondent's practice to note on its invoices to customers that 1/21 (or 1/41) of the charge for the article was for excise tax, and that 20/21 (or 40/41) indicated the purchase price. (R. 18.) This finding clearly indicates that the respondent's purchasers paid the tax; the invoices amount to a representation by the respondent that

the price charged included a charge for the tax.[7] But the respondent claims that other findings of the court below establish that the tax was not collected from the respondent's purchasers. These findings are that the respondent did not increase its catalogue prices during the taxable period, did not add thereto any amounts representing the excise taxes, and did not collect any amount from its purchasers in addition to the catalogue prices. (R. 18.) In such circumstances the District Court in *American Chain Co.* v. *Eaton, supra,* thought that the invoice method such as used here required a conclusion that the tax was collected from the purchaser, but that the effect of the manufacturer's not increasing the total charge was to return the tax to the purchaser. 58 F. (2d) 249. We cannot agree that the failure to raise the catalogue price results in a return of the tax to the purchaser. So many factors enter into the establishment of the price at which an article may be profitably marketed that we think the fact that the total charged to the customer remains stationary is not necessarily an indication of where the burden of an excise tax is falling.[8] The burden was upon the respondent

[7] By instituting this method of paying the tax the respondent was able to reduce the amount payable, since the tax would, under this arrangement, be computed upon an amount less than the total charge to the purchaser. See Regulations 47 (1921 ed.), Article 3. Compare *Lash's Products Co.* v. *United States*, 278 U.S. 175.

[8] There is, for example, nothing in the record to show whether changes in the cost of manufacturing (with all the

to show that the weight of the tax fell upon it. The finding that the respondent did not increase the charge to purchasers is negative only, in that it shows that the respondent did not add to the charge an amount for the tax computed upon the price for which the article was formerly sold. If there were also a finding that the respondent paid a tax computed upon the unchanged charge to purchasers, the Government might offer no objection to the sufficiency of the proof. But in the absence of such a showing and in the presence of a finding that the respondent invoiced the tax as a separate item of the charge to purchasers we contend that the respondent has failed to sustain the burden placed upon it by Section 424 (a) (2) to prove that the tax was not collected from its purchasers.

There is also a failure of proof in another respect if our contention concerning the conclusion to be drawn from the invoice arrangement is correct. The respondent seeks refunds for the period from April, 1923, through February, 1926. (R. 17–18.) The invoicing method was used from May 19, 1923, to December 29, 1925, leaving a period at the beginning and at the end not controlled by any conclusion

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items therein included) affected the price charged for respondent's articles. Again, competition or other market conditions may have been responsible for the failure to increase prices to the purchaser.

to be drawn from the invoice system. (R. 18.) But the court below has found that it is not possible to determine the amount of tax paid for the period when the invoice plan was used (R. 18), and, therefore, it follows that no recovery may be had for separate periods for lack of proof of the amounts involved. Furthermore, it does not appear what respondent's practice was after December, 1925 (R. 18), and we submit that there is a total failure of proof for the period from December 29, 1925 to the end of February, 1926, both as to whether the respondent bore the burden of the tax and as to the amount thereof.

II

SECTION 424(A)(2) PLACED THE MAKING OF REFUNDS THEREUNDER WITHIN THE DISCRETION OF THE COMMISSIONER OF INTERNAL REVENUE, AND HIS DETERMINATION IS NOT REVIEWABLE IN THE COURTS

The Commissioner of Internal Revenue refused to refund the amounts now sued for by the respondent on the ground that such amounts represented taxes that had been passed on to the respondent's customers and had not been returned to them. (R. 17.) The question of the jurisdiction of the courts to review the decision of the Commissioner with respect to refund claims under Section 424(a)(2), and to give judgment for such refunds has been presented to several of the lower Federal courts. The contention of the Government in such cases has been that Section 424(a)(2) placed the refund-

ing of automobile accessories taxes within the discretion of the Commissioner, and that the words "established to the satisfaction of the Commissioner" lead only to that conclusion, unless they are to be disregarded entirely. It was clearly competent for Congress to provide that it should be within the discretion of the Commissioner of Internal Revenue to make these refunds. Cf. *Williamsport Wire Rope Co.* v. *United States*, 277 U.S. 551. While there are not here so many considerations arising from the nature of the matters submitted by the statute for determination as led to the result reached in the *Williamsport Wire Rope Co.* case, yet, we think, the interpretation of Section 424(a)(2) consistently contended for by the Government in the lower courts is the correct one.

This question has been decided adversely to the contentions of the Government in *McCaughn* v. *Electric Storage Battery Co.*, *supra*, in *Boyle Valve Co.* v. *United States*, *supra*, by the District Court in *American Chain Co.* v. *Eaton*, *supra*,[9] and in the case at bar. In two District Court cases the decisions have been favorable to the Government. *Twentieth Century Manufacturing Co.* v. *Hopkins* (N.D. Texas), reported in X-2 Cumulative Bulletin 408; *Sterling Spring Co.* v. *Routzahh* (N.D. Ohio), reported in VIII-2 Cumulative Bulletin 358. The same view is expressed by the dissenting opinion

[9] The Circuit Court of Appeals reversed on the merits of the taxability of the articles, and did not pass on this question.

in *McCaughn* v. *Electric Storage Battery Co.*, *supra*, 63 F. (2d) 718.

In *Routzahn* v. *Willard Storage Battery Co.*, *supra*, the Circuit Court of Appeals for the Sixth Circuit has held that the court may give judgment based upon a ruling that the articles involved were not properly taxed, but that the taxpayer must thereafter satisfy the Commissioner that it bore the burden of the tax as required by Section 424 (a)(2). Thus the court has construed the statute as authorizing the Commissioner to render the court's judgment ineffective by his determination that the taxpayer fails to satisfy the proof required in the statute. The opinion appears to deny the jurisdiction of the court to review the decision of the Commissioner except, perhaps, in cases of arbitrary or capricious action. But at the same time the decision casts doubt upon the jurisdiction of the court to render any judgment at all, for it is settled that no case or controversy under the Constitution is presented where Congress or an administrative officer has authority to refuse payment of the judgment of a Federal court, or where the parties are not concluded by the judgment. *Gordon* v. *United States*, 2 Wall. 561; *In re Sanborn*, 148 U.S. 222; *Hayburn's case*, 2 Dall. 409; *United States* v. *Ferreira*, 13 How. 39. Furthermore, in the *Willard Storage Battery Co.* case the taxpayer brought suit in the District Court without ever having attempted to satisfy the Commissioner that

it had not passed the tax on to the purchasers. Whether or not the Commissioner's determination of that question is subject to judicial review, it seems to us that Section 424(a)(2) should be interpreted as requiring the taxpayer to go before the Commissioner and to obtain a determination by the Commissioner prior to suing in court. Better practice thereby would result, for all justiciable questions with respect to the requested refunds would be properly before the court for decision. If the Commissioner's determination under Section 424(a)(2) cannot be reviewed at the instance of the taxpayer except for abuse of discretion, then a court decision upon the merits of the legality of the tax would be unnecessary, no abuse of discretion appearing. If the Commissioner's determination may be reviewed by the courts, both the legality of the tax and the right to a refund under Section 424(a)(2) could be determined at the same time and the judgment of the court would settle all rights involved.

While we do not urge that the matters to be determined under Section 424 (a) (2) are peculiarly questions of administrative discretion (see *Williamsport Wire Rope Co.* v. *United States, supra,* p. 559), yet we think that no interpretation of the intent of the section so satisfactorily explains the particular reference to the Commissioner as the one which places the making of these refunds within his discretion. The familiar rule of statutory con-

struction that effect should be given to every clause and part of a statute requires that significance be attached to the words "established to the satisfaction of the Commissioner." *Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 208; *United States* v. *Lexington Mill Co.*, 232 U.S. 399, 410.[10] We submit, therefore, that those words were intended to prevent the refunding of automobile accessories taxes unless the manufacturer first satisfied the Commissioner that it had not passed the taxes on to the purchasers or had ultimately borne the burden of the taxes, and that the Commissioner was designated as the sole arbiter of that question unless his determination was shown to be arbitrary or capricious.

III

IF THE RESPONDENT IS ENTITLED TO BRING THIS ACTION, AND IF THE RESPONDENT HAS SATISFIED THE REQUIREMENT OF SECTION 424 OF THE REVENUE ACT OF 1928, THE CASE SHOULD BE REMANDED TO THE COURT BELOW FOR CORRECTED AND ADDITIONAL FINDINGS OF FACT

The court below found that the respondent's ignition coils were equally adapted to marine, automotive, truck, motorcycle or airplane engines, and to outboard motors and engines for concrete mixers, and were not primarily adapted or specially

[10] There has been some judicial discussion of the report of the Committee on Ways and Means with respect to Section 424. While we do not think that the report is helpful on the question whether it was intended that the Commissioner's determination was to be conclusive, for the information of the Court that part of the report referring to Section 424 is printed in Appendix B (*infra*, pp. 29–30).

designed for use as a component of automobiles, motorcycles, automobile trucks, or automobile wagons. (R. 19.) There is no doubt that it was proper for the court to make an ultimate finding of fact on that subject. *United States* v. *Wells*, 283 U.S. 102. But it is clear that the court's finding was drafted to state a conclusion based upon the legal definition of parts and accessories laid down by this Court in *Universal Battery Co.* v. *United States*, 281 U.S. 580, 584, "that articles primarily adapted for use in motor vehicles are to be regarded as parts or accessories of such vehicles." It is obvious that an ultimate finding so framed states in effect that respondent's products are not within the definition of parts and accessories as this Court has construed the statutes and regulations. Thus, the only issue, legal or otherwise, involved in this branch of the case is answered by the court's finding. While we concede that it is generally not necessary for the Court of Claims to support its findings by setting out the underlying circumstantial facts, yet we contend that in such a case as this, where the ultimate finding concludes the parties on the only legal issue present, better practice would require an exposition of the facts upon which the ultimate conclusion rests. Here the ultimate finding appears to stand isolated and unsupported by any other facts the court has found. There was, however, evidence before the court appearing in the report of the Commissioner of the Court of Claims

that the respondent advertised its ignition coils as being primarily adapted for use in automobiles. The Commissioner's report in this respect is set out in Appendix C (*infra*, pp. 31–32). We maintain that if the advertising material were included in the court's findings, the Government would be able to contend successfully that the ultimate finding referred to above is inconsistent with other facts found, and thus establish a case for remand for corrected findings. See *Luckenbach S.S. Co.* v. *United States*, 272 U.S. 533, 539. The Court of Claims has in other cases recognized the importance of advertising when determining whether particular articles are parts or accessories within the meaning of the taxing statutes. See *Cole Storage Battery Co.* v. *United States*, 65 C.Cls. 164, certiorari denied, 278 U.S. 641; *Perfection Gear Co.* v. *United States*, 70 C.Cls. 422; *Edison Storage Battery Co.* v. *United States*, 67 C.Cls. 543, 555. As the case now stands, the Government is precluded from making any legal objection to the judgment below because the court has neglected to include in its findings the facts upon which the conclusion that the articles are not taxable is based.[11] The case should, therefore, be

[11] The judgment of the court below cannot rest upon the finding that respondent's ignition coils were "equally adapted" for other uses (R. 19). That such a conclusion would be a misapplication of the rule of *Universal Battery Co.* v. *United States*, 281 U.S. 580, is argued fully in the Government's brief in *Routzahn* v. *Willard Storage Battery Co.*, No. 329, present term.

remanded for additional findings on the ground that the present findings are "silent in respect of a material matter." *Luckenbach S.S. Co.* v. *United States*, *supra*, p. 539.

The Government submitted a motion to this Court at the time the petition for certiorari was filed to remand the case to the Court of Claims for additional findings of fact. We submit that if this Court is of the opinion that respondent may bring this suit in spite of Section 424 of the Revenue Act of 1928, and has satisfied the requirement of that section, the case should be remanded to the Court of Claims for corrected and additional findings with respect to the manner in which the respondent advertised the articles taxed, in order that any legal question in regard to the application of the taxing statutes will be properly presented for decision.

In regard to the Government's counterclaim, the findings show that refunds were made to the respondent for the period beginning March, 1919, and ending in March, 1923, in the amount of $46,758.53, and for the month of April, 1923, in the amount of $768.76. (R. 17.) These refunds were made on the ground that the respondent's ignition coils were not taxable as parts or accessories. (R. 17.) If the Government is successful in establishing that the coils were properly taxable, the refunds will appear to have been erroneously made and may be

recovered by the United States. *Talcott* v. *United States*, 23 F. (2d) 897 (C.C.A. 9th), certiorari denied, 277 U.S. 604.

CONCLUSION

The respondent has failed to establish its right to recovery under Section 424 (a) (2) of the Revenue Act of 1928, and the decision should be reversed on that ground. The court below has found as a fact that the respondent's articles were not primarily adapted for use on automobiles (i.e., were not taxable) without finding other facts to support that conclusion and has failed to include in the findings certain material facts with respect to the respondent's advertising. The cause should be remanded for corrected and additional findings.

Respectfully submitted.

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NOVEMBER, 1933.

APPENDIX A

Section 900 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1122, provides in part as follows:

> That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased —
>
> (1) Automobile trucks and automobile wagons, (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;
>
> (2) Other automobiles and motorcycles, (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;
>
> (3) Tires, inner tubes, parts, or accessories, for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum;
>
> * * * * *

The pertinent sections of the Revenue Acts of 1921 and 1924 are the same in so far as they relate to the issues of this case. Revenue Act of 1921, c. 136, Sec. 900, 42 Stat. 227, 291; Revenue Act of 1924, c. 234, Sec. 600, 43 Stat. 253, 322–323, (U.S.C., Title 26, Sec. 881).

The pertinent provisions of Regulations No. 47, promulgated May 1, 1919, are as follows:

ART. 15. Definition of parts.—A "part" for an automobile truck, automobile wagon, other automobile, or motorcycle is any article designed or manufactured for the special purpose of being used as or to replace a component part of any such vehicle, and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use, and which is primarily adaptable only for use as a component part of such vehicle. Mere stock or commercial commodities such as bolts, nuts, washers, screws, though used as components for such vehicles, are not "parts" within the meaning of subsection (3) of section 900. Articles, however, which ordinarily would be classed as commercial commodities become parts when, because of their design or construction, they are primarily adaptable for use as component parts of such vehicles. Component parts of articles taxable under this definition are taxable when sold separately, if they have reached such stage of manufacture that they are primarily adaptable for use as such a component part. * * *

The parts quoted of the above Regulations were continued without material changes in Revised Regulations issued under the Revenue Acts of 1921, and 1924. Reg. 47, Art. 15 (1921); Reg. 47, Art. 16 (1924).

Section 424 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 866 provides in part as follows:

SEC. 424. *Refund of Automobile Accessories Tax.*

(a) No refund shall be made of any amount paid by or collected from any manufacturer, producer, or importer in respect of the tax imposed by subdivision (3) of

section 600 of the Revenue Act of 1924, or subdivision (3) of section 900 of the Revenue Act of 1921 or of the Revenue Act of 1918, unless either—

(1) Pursuant to a judgment of a court in an action duly begun prior to April 30, 1928; or

(2) It is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of an article subject to tax, or that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him; or

(3) The Commissioner certifies to the proper disbursing officer that such manufacturer, producer, or importer has filed with the Commissioner, under regulations prescribed by the Commissioner with the approval of the Secretary, a bond in such sum and with such sureties as the Commissioner deems necessary, conditioned upon the immediate repayment to the United States of such portion of the amount refunded as is not distributed by such manufacturer, producer, or importer, within six months after the date of the payment of the refund, to the persons who purchased for purposes of consumption (whether from such manufacturer, producer, importer, or from any other person) the articles in respect of which the refund is made, as evidenced by the affidavits (in such form and containing such statements as the Commissioner may prescribe) of such purchasers, and that such bond, in the case of a claim allowed after February 28, 1927, was filed before the allowance of the claim by the Commissioner.

* * * * *

APPENDIX B

The Committee on Ways and Means report on the Revenue Act of 1928 contained the following comment on Section 424 (House Report No. 2, 70th Cong., 1st Sess., p. 27):

REFUND OF AUTOMOBILE ACCESSORIES TAX

A provision was inserted in the First Deficiency Act of 1927 (which became law on February 28, 1927), prohibiting the refund of amounts paid as taxes upon the sale of automobile accessories, except upon conditions which, in many instances admittedly could not be complied with. The provision was purposely made all embracing, in order that improper refunds would not be made until your Committee was given an opportunity to make a study of the situation.

Generally speaking, it is believed that the amounts paid upon the sale of automobile accessories was collected from the purchaser and passed on directly to the consumer. Despite the fact that the tax is, in legal effect, a tax upon the manufacturer, it turned out that the manufacturer, in almost all cases, was but a collecting agency. The Committee does not believe that, as a general principle, the taxes paid upon such articles subsequently held to be not taxable should be refunded and thus unjustly enrich the manufacturers who merely collected the tax from the persons to whom they sold the articles.

However, there are some cases where refunds should properly be made. Accord-

ingly, section 424 of the new Bill provides that judgments of the court should be paid if the action was begun prior to the effective date of the Deficiency Act. It also provides that refunds may be made whenever the taxpayer can establish to the satisfaction of the Commissioner that the amount he paid was excessive (not by reason of the fact that the article was wrongly taxed but by reason of the fact that the tax was improperly computed); or that he did not pass the tax on (for example, where at the time of sale he did not know the article was taxed, or where he was called upon to pay an additional tax after the sale had been made); or that the tax was returned to the purchaser or a lessee (for example, where there was an adjustment in the selling price, in accordance with a prior agreement, such as cash discounts, quantity rebates, and wholesale bonuses, or where a sale was rescinded). In all other cases he must comply with conditions similar to those imposed by the proviso in the Deficiency Act and give a bond conditioned upon the refund of the tax to the ultimate consumer.

APPENDIX C

With respect to the respondent's advertising, the Commissioner reported to the Court of Claims as follows (pp. 2, 3): It [the respondent] did, however, manufacture and sell several types of ignition coils which it very generally advertised as:

> Genuine Jefferson automobile ignition coils interchangeable with any of the standard battery ignition systems.

The plaintiff further advertised:

> The Jefferson line of automobile ignition coils consists of only a few types, which offer an exact replacement for any of the coils used as standard equipment. The coils are sufficiently flexible through the use of interchangeable fittings, adjustable caps and terminals, to enable one type of coil to be used to replace many of the different coils now in general use.

During the period involved herein it published and distributed charts describing and illustrating its so-called "Jefferson automobile ignition coils" indicating which of its several models of coils could be used as replacements on practically all makes and models of automobiles, and further specifically designated which of its several types of coils should be used as replacements in connection with the various standard lighting and ignition systems. One of the coils illustrated and described was the "Jefferson emergency automobile ignition coil"

which is illustrated with four types of brackets for mounting. That coil is described as follows:

> The Jefferson emergency coil, with the three simple adapters supplied with it, makes it an interchangeable or replacement coil on all standard automobile ignition systems. A heavy duty condenser is built into the coil, which can be utilized in the ignition circuit or eliminated, as the particular replacement requires. For 12-volt systems a resistance unit is necessary.
>
> The installation is very simple. Complete instructions and coil specification list are furnished with each coil.

Another type illustrated and described is the "Jefferson universal automobile ignition coil" which is illustrated with four types of brackets and a resistance unit. That coil is described as follows:

> The Jefferson universal coil is designed for replacement on all standard battery ignition systems. It is the only ignition coil outfit which is universally adaptable to all standard battery ignition systems. The Jefferson universal coil represents the highest efficiency in coil construction. It is compact, dependable in performance, and very simple to install.

In one of its circulars captioned "Jefferson Automobile Ignition Coils" the replacement chart sheet carries the following heading:

> The last word in automobile ignition coils. Jefferson coils are the only 100 per cent complete line on the market, and consist of only a few standard types. Our trade-mark identifies genuine Jeffersons—get them from your jobber.

U. S. GOVERNMENT PRINTING OFFICE : 1933

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 171

THE UNITED STATES, *Petitioner,*

v.

JEFFERSON ELECTRIC MANUFACTURING COMPANY, *Respondent.*

On Petition for a Writ of Certiorari to the Court of Claims.

BRIEF FOR RESPONDENT IN OPPOSITION.

GEORGE P. MCCABE,
ADRIAN C. HUMPHREYS,
NEWTON K. FOX,
Attorneys for Respondent.

July, 1933.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF FOR RESPONDENT IN OPPOSITION.

OPINION BELOW.

The opinion of the Court of Claims on demurrer (R. 12) is reported in 38 Fed. (2d) 139 and on the merits (R. 16) in 2 Fed. Supp. 778.

JURISDICTION.

The judgment of the Court below was entered on March 13, 1933 (R. 20). A petition for a writ of certiorari and motion to remand were filed June 13, 1933. The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925. (43 Stat. 936.)

QUESTIONS PRESENTED.

The questions presented as stated by the Petitioner, with the correctness of which the Respondent begs to disagree, are as follows:

1. Whether Respondent may recover Manufacturers' Excise Tax paid under the provisions of Sections 900 of the Revenue Acts of 1918 and 1921 and Section 600 of the Revenue Act of 1924, when such taxes appear to have been collected from Respondent's customers and were not proved to have been returned to said customers as provided in Section 424 of the Revenue Act of 1928.

2. Whether under Section 424 of the Revenue Act of 1928 the Court below had jurisdiction to enter a judgment for the refund of Manufacturers' Excise Taxes when it appeared that it was not established to the satisfaction of the Commissioner of Internal Revenue that said taxes had not been collected directly or indirectly from Respondent's customers, or that said taxes had been returned to Respondent's customers.

3. Whether the Court of Claims followed permissible practice in making an ultimate finding of fact that the ignition coils manufactured and sold by the Respondent were not primarily adapted, or specially designed for use in automobiles, motor cycles, automobile trucks or automobile wagons within the meaning of the applicable taxing statutes.

The Respondent considers that the real questions presented are as follows:

1. Whether ignition coils sold for general use and not primarily adapted or specially designed for use as a component part of automobiles, motorcycles, automobile trucks, or automobile wagons were subject to tax as automobile parts or accessories under Section 900 of the Revenue Act of 1921 and Section 600 of the Revenue Act of 1924.

2. Does Section 424(a) of the Revenue Act of 1928 deprive the Court of Claims of jurisdiction to review the action of the Commissioner of Internal Revenue in refus-

ing to refund excise taxes which were erroneously and illegally assessed and collected where the taxes were assumed and paid by the manufacturer and were not passed on to customers.

3. Are the findings of the Court of Claims conclusive and sufficient to support the judgment.

STATUTES AND REGULATIONS INVOLVED.

Section 900 of the Revenue Act of 1918 (40 Stat. 1057, 1122)

Section 900 of the Revenue Act of 1921 (42 Stat. 227, 291)

Section 600 of the Revenue Act of 1924 (43 Stat. 253, 322)

Section 424(a) of the Revenue Act of 1928 (45 Stat. 791, 866)

Treasury Regulations 47, Article 15 (1919)

Treasury Regulations 47, Article 15 (1921)

Treasury Regulations 47, Article 16 (1924)

The above are set out in the petition for certiorari as Appendix A.

STATEMENT.

This suit was brought by Respondent in the Court of Claims to recover manufacturers' excise taxes illegally assessed and collected for the period from April 1, 1923 to December 31, 1924, in the sum of $14,966.17, and for the period from January 1, 1925 to February 26, 1926, inclusive, in the sum of $5,051.41, a total of $20,017.58. (R. 12-13, 17.)

The amount in suit represents the unrefunded balance on claims for refund of $67,544.87. Excise taxes in the amount of $47,527.29 were previously refunded on the claims by the Government. (R. 18.)

The Respondent is a corporation and during the period from May, 1919 to May, 1926 was engaged in the manufacture and sale of ignition coils. (Findings 1, 2) (R. 16.)

None of the coils sold were specially designed for automobiles and none were sold for original equipment. (Finding 11) (R. 19.) The coils were equally adapted to marine, automobile, tractor, motor cycle, or airplane engines, and to outboard motors and engines for concrete mixers. They were manufactured and sold for general use and were not primarily adapted or specially designed for use as a component part of automobiles, motor cycles, automobile trucks or automobile wagons. (Finding 11) (R. 19.) The coils were sold for the most part to jobbers and distributors and some were sold to manufacturers, wholesalers, mail order houses and dealers. (Finding 11) (R. 19.)

During the period in question Respondent invoiced its catalogue prices to all customers, and did not add any amount representing Excise Tax, and did not collect from its customers any amount in addition to the catalogue prices. The catalogue prices so invoiced and collected, were transferred by plaintiff to its general ledger account in totals without separation into any elements, such as tax, charges for parcel post, insurance. The Excise Tax was set up by Respondent in an additional account styled "Excise Tax Expense". (Finding 7.) (R. 18.) Respondent's catalogue prices were not increased or decreased by reason of the imposition of the excise taxes on automobile parts or accessories. (Finding 9.) (R. 18.)

During the period in question the Respondent filed monthly returns of the manufacturers' excise tax and paid the taxes shown thereon on its sales of coils. (Finding 2.) (R. 16.)

Respondent duly filed claims for refund of the taxes paid on the ground that the coils were not parts for automobiles or motor cycles. (Finding 3.) (R. 17.) The claims were allowed in part and rejected in part: (Findings 3, 4, 5, 6.) (R. 17-18.) The rejection was based on the ground that the tax had been passed on to customers without refund and without submission of the bond specified in Treasury Decision 4195. (Findings 4, 5.) (R. 17.)

The Respondent did not give a bond because it had itself assumed and paid the Manufacturers' Excise Tax, and its customers had no right, title, or interest in a refund of the tax. The Respondent, during the period February 24, 1919, to April 30, 1919, had added $1,322.30 as tax on its invoices to customers. Due to the refusal of its customers to pay the tax the practice was abandoned in April, 1919. Thereafter Respondent assumed and paid the tax itself. (R. 5, 13.) No portion of the tax of $1,322.30 is sought to be recovered in this suit. (Finding 3) (R. 13, 17.)

Within the statutory period after rejection of the claims for refund, Respondent on March 25, 1929, brought suit in the Court of Claims (R. 1). The United States demurred to the petition on the ground that section 424(a) of the Revenue Act of 1928 deprived the Court of Claims of jurisdiction to review the action of the Commissioner of Internal Revenue in refusing to refund the taxes paid. (R. 12.) The Court overruled the demurrer. (R. 12), (38 Fed. (2d) 139.) The United States first filed a general traverse and later a counterclaim for the excise taxes which had previously been refunded to the Respondent. (R. 14.)

The Court of Claims made special findings of fact (R. 16-19) and entered judgment for the Respondent in the sum of $20,017.58 and dismissed the counterclaim of the United States. (R. 20-21) (2 Fed. Supp. 778.)

A petition for certiorari and motion to remand were filed on June 13, 1933.

REASONS FOR DENYING THE PETITION.

1. The law of the case has already been settled by this Court in *Universal Battery Co. v. United States*, 281 U. S. 580.

2. There are no conflicting decisions by the courts on the application of the law.

3. The case does not involve any question of general public interest or legal principle of broad and general application.

4. The case involves only questions of fact which have been fully found by the Court of Claims and are conclusive on certiorari.

5. The Court of Claims has jurisdiction over suits to recover internal revenue taxes and Section 424(a) of the Revenue Act of 1928 does not in fact limit the jurisdiction of that Court to review the action and findings of the Commissioner of Internal Revenue.

6. The taxes were assumed and paid by Respondent, were not collected from its customers and therefore no bond was required as specified in Treasury Decision 4195.

7. The counterclaim of the Government was properly dismissed because no evidence was presented in support of the claim.

ARGUMENT.

I. The Law of the Case Has Already Been Settled by This Court.

In the case of *Universal Battery Co. v. United States*, and associated cases, 281 U. S. 580, this court held that storage batteries of a type not primarily adapted for use on automobiles, and gascolators, a device alleged to be sold for general use on various types of internal combustion engines, could not be regarded as parts or accessories of automobiles unless there are affirmative findings on the issue of primary adaptation. This court said:

> "Certainly it would be unreasonable to hold that articles equally adapted to a variety of uses and commonly put to such uses, one of which is use in motor vehicles, must be classified as parts or accessories for such vehicles." (Pages 583-584)

II. There Are No Conflicting Decisions by the Courts on the Application of the Law.

The test prescribed by Article 15 of Regulations 47, approved by this Court in *Universal Battery Co. v. United*

States, 281 U. S. 580, is whether or not the ignition coils were specially designed or primarily adapted for use in motor vehicles. If they were not, but were articles of commerce equally adapted and designed for other uses, they were not subject to the tax. On these questions of fact the findings of the Court of Claims were definite and complete.

As to the coils the Court from the evidence found:

"They were not specially designed for automobiles."

* * *

"They were manufactured and sold for general use and were not primarily adapted or specially designed for use as a component of automobiles, motorcyles, automobile trucks, or automobile wagons" (Finding 11, R. 19).

On such findings the judgment could only have been for the plaintiff below.

Atwater Kent Mfg. Co. v. United States, 62 C. Cls. 419;
Wells Mfg. Co. v. United States, 66 C. Cls. 283;
Milwaukee Motor Products v. United States, 66 C. Cls. 295;
Philadelphia Storage Battery Co. v. Lederer (D. C.), 21 Fed. (2d) 320;
General Lead Batteries Co. v. United States (C. Cls.), 60 Fed. (2d) 177;
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Anthony Co. v. United States, 73 C. Cls. 758;
Boyle Valve Co. v. United States (C. Cls.), 38 Fed. (2d) 135;
American Chain Co. v. Eaton, (D. C.) 58 Fed. (2d) 246, 248; reversed on other grounds in Eaton v. American Chain Co., 63 Fed. (2d) 783;
Electric Storage Battery Co. v. McCaughn (D. C.), 52 Fed. (2d) 205, affirmed (by C. C. A. 3) in
McCaughn v. Electric Storage Battery Co., 63 Fed. (2d) 715;

U. S. Light & Heat Corp. v. United States; Universal Storage Battery Co. v. United States; Englert Mfg. Co. v. United States; M. & M. Co. v. United States; all decided by the Court of Claims on June 5, 1933, and unreported to date.

No decision to the contrary has come to our attention.

III. The Case Therefore Cannot and Does Not Involve Any Question of General Public Interest or Legal Principle of Broad and General Application as Any Judgment Depends Upon the Particular Facts Involved.

IV. The Case Involves Only Questions of Fact Which Have Been Fully Found by the Court of Claims and Are Conclusive on Certiorari.

Rule 38, paragraph 3, of the Rules of this Court provide:

> "The special findings required by the two preceding paragraphs shall be in the nature of a special verdict, and *shall set forth the ultimate facts found from the evidence* but not the evidence from which they are found." (Italics supplied.)

The findings of the Court of Claims are full and complete. It has found all of the "ultimate facts" sufficient to support its judgment under the foregoing rule of this Court. The Court found as to the coils:

> 1. "They were not specially designed for automobiles."
>
> 2. "Plaintiff sold the ignition coils * * * for the most part to jobbers and distributors. * * * Some were sold to manufacturers, wholesalers, mail order houses and dealers."
>
> 3. "None of its coils were sold for original equipment."

4. "They were manufactured and sold for general use and were not primarily adapted or specially designed for use as a component of automobiles, motor cycles, automobile trucks, or automobile wagons." (Finding 11, R. 19.)

In its opinion the Court states (2 Fed. Supp. 778, 780):

> "All of plaintiff's sales of ignition coils were taxed whether they were advertised for use on automobiles or not; the entire amount of excise tax paid during the period involved had been proved; none of plaintiff's ignition coils were especially adapted for use in automobiles; none of plaintiff's ignition coils were sold by plaintiff to automobile manufacturers, dealers, or owners for use on automobiles; all of plaintiff's ignition coils were equally adapted for use on any internal-combustion engine, and as the plaintiff sold to wholesalers, jobbers, mail order houses and dealers, and as their use was general in any kind of internal-combustion engine, it was not within plaintiff's knowledge to what particular use they were put". (R. 20.)

The findings of the court are sufficient to support its judgment and are conclusive upon this Court.

Cramp & Sons, et al. v. United States, 239 U. S. 221.
Hathaway v. United States, 249 U. S. 460.
Keokuk & Hamilton Bridge Co. v. United States, 260 U. S. 125.
Milliken v. United States, 283 U. S. 15.
United States v. Anderson, 269 U. S. 422.
Rogers v. United States, 270 U. S. 154.
United States v. Swift & Co., 270 U. S. 124.

V. The Court of Claims Has Jurisdiction Over Suits to Recover Internal Revenue Taxes and Section 424 (a) of the Revenue Act of 1928 Does Not in Fact Limit the Jurisdiction of that Court to Review the Action and Findings of the Commissioner of Internal Revenue.

The broad and general jurisdiction of the Court of Claims in internal revenue tax cases has been repeatedly sustained.

> United States v. Emery, Bird, Thayer Realty Co., 237 U. S. 28.

The question of jurisdiction has been raised in similar cases, in view of section 424(a) of the Revenue Act of 1928, and the appellate courts have, in every instance, as did the court below, sustained their jurisdiction and the right to review the action of the Commissioner of Internal Revenue.

> American Chain Co. v. Eaton (D. C., Conn.) 58 Fed. (2d) 246, 248.
> Willard Storage Battery Co. v. Routzahn, (D. C. N. D. Ohio, decided Sept. 15, 1931), unreported; affirmed by (C. C. A. 3) in
> Routzahn v. Willard Storage Battery Co., 65 Fed. (2d) 89.
> Electric Storage Co. v. McCaughn, (D. C., E. D., Pa.) 52 Fed. (2d) 205, affirmed by (C. C. A. 3) in
> McCaughn v. Electric Storage Co., 63 Fed. (2d) 715.
> Boyle Valve Co. v. United States, 38 Fed. (2d) 135.
> Jefferson Electric Mfg. Co. v. United States, 38 Fed. (2d) 139.

The reasoning of the above decisions may be summarized as follows. "The determination whether the tax was collected by the manufacturer directly or indirectly from the purchaser"—namely—"added to the purchaser's price of the article * * * is an ordinary question of fact; one with respect to which the courts constantly review the Commissioner's determination and one that is involved in almost

every suit for refund." Section 424 (a) of the Revenue Act of 1928 as shown by the Report of the Ways and Means Committee of the House and properly construed, "deals not with rights of action, but with limitations upon the power of the Commissioner to make refunds", because it "no where refers to the plaintiff's right of action to recover taxes by litigation nor to the jurisdiction of the court". In other words the section is not jurisdictional but "an administrative measure for the guidance of the Commissioner" and "does not proport to contain any provision prescribing conditions under which taxes may be collected by means of a suit".

VI. The Taxes Were Assumed and Paid by Respondent, Were Not Collected from Its Customers and Therefore No Bond was Required as Specified in Treasury Decision 4195.

As the Court below aptly said when this case was before it on demurrer, 38 Fed. (2d) 139, 140.

> "Defendant overlooks the fact that the section provides that a refund may be made without a bond if it is shown that the tax was wholly borne and paid by the manufacturer. In such case no bond is necessary under subsection (a) (3)." (R. 13.)

The evidence was overwhelming and uncontradicted that the taxes were neither billed to nor collected from the customers of Respondent and the Court so found. (Findings 7-9) (R. 48.) These findings are conclusive that the tax was assumed and paid by Respondent and was not passed on to its customers.

Furthermore this is a "Manfacturers Excise Tax" and not a "Sales Tax". Therefore the taxes cannot be passed on to the customers unless the tax is "added to the purchase price of the article".

> Boyle Valve Co. v. United States, 38 Fed. (2d) 135, 137.

On the particular point the court found in the case at bar:

> "7. For the taxable period in question, viz., May 1919 to the end of February 1926 plaintiff, in the sale of ignition coils, invoiced its catalogue prices to all customers, and did not add thereto any amounts representing excise taxes, or collect from its customers amounts additional to the catalogue prices. The catalogue prices so invoiced and collected, were transferred by plaintiff to its general ledger account in totals without separation into any elements, such as tax, charges for parcel post, insurance. The excise tax which it considered payable was set up in an additional account styled 'Excise Tax Expense'." (R. 18)

> "9. Plaintiff's catalogue prices were not increased or decreased by reason of the imposition of the excise tax on automobile parts or accessories." (R. 18)

The taxes do not "appear" to have been collected from Respondent's customers as suggested on Page 2 of the petition for certiorari. They were not in fact collected from its customers but were assumed and paid by Respondent and the Court of Claims so found.

VII. The Counterclaim of the Government was Properly Dismissed Because No Evidence was Presented in Support of the Claim.

Petitioner as one of the specifications of error alleges, "In dismissing the petitioner's counterclaim and giving judgment for the Respondent".

Petitioner offers no reason or argument as to why the court should not have dismissed its counterclaim and given judgment for the Respondent. The judgment is based on the court's findings by which it is supported. The dismissal of the counterclaim was the only action which the court could take because the petitioner offered no proof in support of its counterclaim and because there was no basis in fact for the counterclaim.

As stated by the court below (2 Fed. Supp. 778, 780):

> "The only question involved is whether ignition coils manufactured and sold by the plaintiff were subject to tax as automobile parts or accessories under section 900 of the Revenue Act of 1918 and 1921, and section 600 of the Revenue Act of 1924." (R. 20.)

CONCLUSION.

The answer to the "Questions Presented" on pages 1 and 2 of the petition for certiorari are obvious:

1. The taxes are not returnable to Respondent's customers because they were not collected from the customers. The evidence on this point was uncontradicted and the Court so found.

2. The Court of Claims has jurisdiction to review the action of the Commissioner of Internal Revenue and found that the taxes had not been collected from Respondent's customers and therefore were not returnable to the customers.

3. The "ultimate" finding of the Court of Claims that the coils "were manufactured and sold for general use and were not primarily adapted or specially designed for use as a component of automobiles" was proper and necessary to support its judgment and its finding is conclusive on certiorari.

The judgment of the Court of Claims was correct under the facts as proved and found. Because of the lack of conflicting court decisions on the questions involved the petition for certiorari and motion to remand should be denied.

Respectfully submitted,

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Newton K. Fox,
Attorneys for Respondent.

July, 1933.

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 171.

THE UNITED STATES,

Petitioner,

v.

JEFFERSON ELECTRIC MANUFACTURING COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR RESPONDENT.

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ADRIAN C. HUMPHREYS,
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Attorneys for Respondent.

THE BALLOU PRESS, NEW YORK.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1933.

No. 171.

THE UNITED STATES,

Petitioner,

v.

JEFFERSON ELECTRIC MANUFACTURING COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR RESPONDENT.

Opinions Below.

The opinion of the Court of Claims on demurrer (R. 12) is reported in 38 Fed. (2) 139 and on the merits (R. 16) in 2 Fed. Supp. 778.

Jurisdiction.

The judgment of the Court below was entered on March 13, 1933 (R. 20). Petition for a writ of certiorari and motion to remand were filed June 14, 1933 and the petition was granted October 9, 1933. The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925 (43 Stat. 936).

Questions Presented.

The Respondent does not agree with the questions as stated by the Petitioner but considers that the questions are more accurately stated as follows:

1. Whether ignition coils sold for general use and not primarily adapted or specially designed for use as a component part of automobiles, motorcycles, automobile trucks, or automobile wagons were subject to tax as automobile parts or accessories under Section 900 of the Revenue Act of 1921 and Section 600 of the Revenue Act of 1924?

2. Were the taxes "passed on" to Respondent's customers and was Respondent obligated to file the bond specified in Treasury Decision 4195 and Section 424(a)(3) of the Revenue Act of 1928?

3. Does Section 424(a) of the Revenue Act of 1928 deprive the Court of Claims of jurisdiction to review the action of the Commissioner of Internal Revenue in refusing to refund excise taxes which were erroneously and illegally assessed and collected where the taxes were assumed and paid by the manufacturer and were not passed on to customers?

4. Are the special findings of the Court of Claims conclusive on appeal and sufficient to support the judgment?

5. Was the counterclaim by the Government properly dismissed.

Statutes and Regulations Involved.

Section 900 of the Revenue Act of 1918 (40 Stat. 1057, 1122).

Section 900 of the Revenue Act of 1921 (42 Stat. 227, 291).

Section 600 of the Revenue Act of 1924 (43 Stat. 253, 323).

Section 424(a) of the Revenue Act of 1928 (45 Stat. 791, 866).

Treasury Regulations 47 (1919)—Article 15—as revised without material change December 1920, December 1921, and August 1924, as Article 16.

The pertinent parts of the above are set out as Appendix A to Petitioner's brief.

Statement.

This suit was brought by Respondent in the Court of Claims to recover Manufacturers' Excise Taxes alleged to have been illegally assessed and collected for the period from April 1, 1923 to December 31; 1924 in the sum of $14,966.17 and for the period from January 1, 1925 to February 26, 1926, inclusive, in the sum of $5,051.41, a total of $20,017.58 (R. 12).

The Respondent was and is a corporation engaged in the manufacture and sale of ignition coils (Finding 1, 2) (R. 16). The ignition coil is a form of transformer and is a device that takes a low voltage, relatively high amperage current, and transforms it to a high voltage, relatively low amperage current, the resulting voltage being sufficiently high to bridge the spark gap of the spark plug, thereby supplying the flame which ignites the gas in the cylinder of any internal-combustion engine (Finding 11) (R. 18-19). The coils were not specially designed for automobiles and were in use prior to the advent of the automobile (Finding 11) (R. 19).

Respondent sold the ignition coils manufactured by it for the most part to jobbers and distributors and did not know for what special purpose the coils were to be used. Some were sold to manufacturers, wholesalers, mail order houses and dealers. None of its coils were sold for original equipment (Finding 11) (R. 19). Respondent's ignition coils were equally adapted to marine automotive, tractor truck,

motorcycle or aeroplane engines or outboard motors or concrete mixers. They were manufactured and sold for general use and were not primarily adapted or specially designed for use as a component of automobiles, automobile trucks or automobile wagons (Finding 11) (R. 19).

During the period in question Respondent invoiced its catalogue prices to all customers, and did not add thereto any amounts representing excise taxes, or collect from its customers amounts additional to the catalogue prices. The catalogue prices so invoiced and collected, were transferred by plaintiff to its general ledger account in totals without separation into any elements, such as tax, charges for parcel post, insurance. The excise tax which it considered payable was set up in additional account styled "Excise Tax Expense" (Finding 7) (R. 18). Respondent's catalogue prices were not increased or decreased by reason of the imposition of the excise taxes on automobile parts or accessories (Finding 9) (R. 18).

During the period in question the Respondent filed monthly returns of the manufacturers' excise tax and paid the taxes shown thereon on its sales of coils (Finding 2) (R. 16).

Respondent duly filed claims for refund of the taxes paid on the ground that the coils were not taxable as parts for automobiles or motorcycles (Findings 3, 4, 5) (R. 17). The claims were allowed in the amount of $47,527.29 and were rejected in the amount of $20,017.58 (Findings 3, 4, 5, 6) (R. 17-18). The rejection was based on the ground that the tax had been passed on to customers without refund and the bond specified in Treasury Decision 4195 had not been furnished (Findings 4, 5) (R. 17).

The Respondent did not give such a bond because it had assumed and paid the Manufacturers' Excise taxes sought to be recovered (R. 13, 16, 18). The Respondent, during the period February 24, 1919, to April 30, 1919, added to the purchase price on its invoices to customers $1,322.30 as tax (R. 13, 17).

The customers refused to pay the tax and the practice was abandoned in April, 1919. Thereafter Respondent assumed and paid the tax itself (R. 13, 18). No portion of the tax of $1,322.30 is sought to be recovered in this suit (R. 13) (Finding 3) (R. 17).

After rejection of the claims for refund, Respondent on March 25, 1929 brought suit in the Court of Claims (R. 1). The United States demurred to the petition on the ground that section 1241(a) of the Revenue Act of 1928 deprived the Court of Claims of jurisdiction to review the action of the Commissioner of Internal Revenue in refusing to refund the taxes paid (R. 12). The Court overruled the demurrer (R. 12) (38 Fed. (2d) 139). The United States first filed a general traverse and later a counterclaim for the excise taxes which had previously been refunded to the Respondent (R. 14).

The Court of Claims made special findings of fact (R. 16-19) and entered judgment for the Respondent in the sum of $20,017.58 and dismissed the counterclaim of the United States (R. 20-21) (2 Fed. Supp. 778).

Petition for certiorari and motion to remand were filed on June 14, 1933, and the petition was granted on October 9, 1933.

ARGUMENT.

I. The coils of respondent are not subject to tax under the facts as found by the Court of Claims, under the treasury regulations, or under the law as construed by the Courts.

In the case of *Universal Battery Co.* v. *United States,* and associated cases, 281 U. S. 580, this Court held that storage batteries of a type not primarily adapted for use on automobiles, and gascolators, a device alleged to be sold for general use on various types of internal combustion engines, could not be regarded as parts or accessories of automobiles

unless there are affirmative findings on the issue of primary adaptation. This Court said:

> "Certainly it would be unreasonable to hold that articles equally adapted to a variety of uses and commonly put to such uses, one of which is use in motor vehicles, must be classified as parts or accessories for such vehicles" (pp. 583-584).

The test of taxability prescribed by Article 15 of Regulations 47 (Revised) approved by this Court in *Universal Battery Co.* v. *United States,* 281 U. S. 580, is as follows:

> "ART. 15. *Definition of parts.*—A 'part' for an automobile truck, automobile wagon, other automobile, or motorcycle is any article designed or manufactured for the special purpose of being used as or to replace a component part of any such vehicle, and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use, and which is primarily adaptable only for use as a component part of such vehicle." * * *

So an article which is equally adapted to or designed for other uses is not subject to tax as a part of an automobile.

In the case at bar the Commissioner of Internal Revenue found that the coils sold by Respondent were not taxable as parts of an automobile and refunded part of the taxes paid. The balance of the taxes were unrefunded not because the coils were parts of an automobile but because the Commissioner considered that the tax had been passed on to Respondent's customers.

As to the coils of Respondent the Court of Claims found:

> "They were not specially designed for automobiles. Prior to such automobile use the coil was being used for stationary internal-combustion engines; also for motorcycles, and marine works" (Finding 11) (R. 19).

> "Plaintiff sold the ignition coils, manufactured by it and involved in this suit, for the most part to jobbers and distributors, and did not know for what special pur-

pose such coils were to be used. Some were sold to manufacturers, wholesalers, mail-order houses, and dealers. None of its coils were sold for original equipment" (Finding 11) (R. 19).

"Plaintiff's ignition coils were equally adapted to marine, automotive, tractor, truck, motorcycle, or airplane engines, and to outboard motors and engines for concrete mixers. They were manufactured and sold for general use and were not primarily adapted or specially designed for use as a component of automobiles, motorcycles, automobile trucks, or automobile wagons" (Finding 11) (R. 19).

In view of these findings the coils of Respondent are not subject to tax as automobile parts under the following decisions:

Atwater Kent Mfg. Co. v. *United States*, 62 Ct. Cls. 419;

Wells Mfg. Co. v. *United States*, 66 Ct. Cls. 283;

Milwaukee Motor Products v. *United States*, 66 Ct. Cls. 295;

Philadelphia Storage Battery Co. v. *Lederer* (D. C.), 21 Fed. (2d) 320;

General Lead Batteries Co. v. *United States* (Ct. Cls.), 60 Fed. (2d) 177;

Routzahn v. *Willard Storage Battery Co.* (C. C. A. 6), 65 Fed. (2d) 89;

Dutton & Sons v. *United States* (Ct. Cls.), 59 Fed. (2d) 839;

Anthony Co. v. *United States* (Ct. Cls.), 56 Fed. (2d) 481;

Boyle Valve Co. v. *United States* (Ct. Cls.), 38 Fed. (2d) 135;

Electric Storage Battery Co. v. *McCaughn* (D. C.), 52 Fed. (2d) 205;

McCaughn v. *Electric Storage Battery Co.*, 63 Fed. (2d) 715;

U. S. Light & Heat Corp. v. *United States,* 3 Fed. Supp. 861;
Universal Storage Battery Co. v. *United States,* 3 Fed. Supp. 878;
Englert Mfg. Co. v. *United States,* 3 Fed. Supp. 873;
M & M Co. v. *United States,* 3 Fed. Supp. 886.

There is no conflict in the decisions of the Circuit Courts of Appeal.

The rule of chief or principal use has no application to the facts of this case because the Treasury Department has admitted that the articles manufactured by the Respondent are not parts of automobiles by refunding part of the taxes paid. The sole basis of the rejection of the balance of the claims for refund was that the tax had been passed on to customers and that the bond specified in Treasury Decision 4195 had not been furnished (Findings 3, 4, 5, 6) (R. 17-18).

While the rule of chief or principal use has been applied in cases arising under the Tariff laws, it can have no application to the facts as found in this case.

Duties are levied under the Tariff Acts upon articles "chiefly used" for a particular purpose or articles "manufactured wholly or in part of" a certain material or articles "wholly or in chief value" of a certain kind.

Compare

Cadwalader v. *Wanamaker,* 149 U. S. 532.

The theory of chief or principal use has never been embodied in the excise tax laws and has never been adopted in the Excise Tax Regulations as a basis of taxability. In the imposition of excise taxes, chief use has no application where there is a question of equal adaptability to various uses since a product adapted or designed for a variety of uses is not subject to tax.

The cases of *Magone* v. *Wiederer,* 159 U. S. 555, and *Magone* v. *Heller,* 150 U. S. 70, decide that the chief or prin-

cipal use of an article is determinative of its proper tariff classification, except where the article is "commonly, practically and profitably used for a different purpose".

The findings of the Court below are sufficient to meet the test of the Regulations particularly since the coils have been and are used with every and any internal combustion engine. The motion of Petitioner to remand the case to the Court of Claims for further findings should, on the record, be denied.

II. The taxes were not "passed on" to respondent's customers and respondent was not obligated to file the bond specified in treasury decision 4195 and Section 424(a)(3) of the Revenue Act of 1928.

This case involves a statute imposing a Manufacturer's Excise Tax. The tax is imposed on the manufacturer, not an the customer. It is *not* a Sales Tax and cannot be "passed on" as such to customers because it is either paid by the manufacturer based on his selling price to a purchaser or is absorbed in the cost of the product to a purchaser.

Section 628 of the Revenue Act of 1918 levied a tax on soft drinks sold by the manufacturer. The statute is in all respects similar to the one now before the Court. This Court held that the tax could not be "passed on" to the customer in *Lash's Products Company* v. *United States,* 278 U. S. 175, saying:

> * * * "This tax was paid by the petitioner, calculated at ten per centum of the sum actually received by it for the goods sold. But the petitioner had notified its customers beforehand that it paid the ten per cent. tax and it contends that in this way it passed the tax on and that the true price of the goods was the sum received less the amount of the tax. The phrase 'passed the tax on' is inaccurate, as obviously the tax is laid and remains on the manufacturer and on him alone. *Heckman & Co.* v. *I. S. Dawes & Son Co.*; 12 F. (2d) 154. The purchaser does not pay the tax. He pays or may pay the seller

more for the goods because of the seller's obligation, but that is all." * * * (pp. 175-176).

The uncontradicted evidence and findings in the case at bar show that the taxes were not "passed on" to customers but were borne by Respondent. The findings are conclusive that the tax was assumed and paid by Respondent and was not "passed on" to its customers.

The Court below found:

"7. For the taxable period in question, viz., May 1919 to the end of February 1926 plaintiff, in the sale of ignition coils, invoiced its catalogue prices to all customers, and did not add thereto any amounts representing excise taxes, or collect from its customers amounts additional to the catalogue prices. The catalogue prices so invoiced and collected, were transferred by plaintiff to its general ledger account in totals without separation into any elements, such as tax, charges for parcel post, insurance. The excise tax which it considered payable was set up in an additional account styled 'Excise Tax Expense'" (R. 18).

"8. For a part of the taxable periods in question plaintiff made on its invoices to customers certain notations with respect to the excise tax which it considered applicable.

Up to May 19, 1923, plaintiff made no such notations on its invoices to customers.

Beginning May 19, 1923, up to December 29, 1925, it was plaintiff's practice to note on its invoice as to customers the following: 'On automotive accessories 1/21 of amount indicated herein equals 5% excise tax. 20/21st of amount indicated equal price,' during the period when the 5% tax rate was in effect, and substantially the same notation during the period when the 2½% rate was in effect, '1/21' being changed to '1/41' and '20/21' to '40/41.' It does not definitely appear what the practice was thereafter as to notations on invoices" (R. 18).

"9. Plaintiff's catalogue prices were not increased or decreased by reason of the imposition of the excise tax on automobile parts or accessories" (R. 18).

The taxes were *not in fact* collected from its customers but were assumed and paid by Respondent.

The method of billing customers does not establish that the tax was "passed on". The tax was so billed to meet the requirements of Article 3 of Treasury Regulations 47 (Revised December, 1920) (Revised December, 1921) (Revised August, 1924) and for no other purpose.

Since the taxes were assumed and paid by the Respondent, there is no obligation to file the bond specified in Treasury Decision 4195 and Section 424(a)(3) of the Revenue Act of 1928.

As the Court below aptly said in its opinion, in the case at bar, on demurrer, 38 Fed. (2d) 139, 140:

> "* * * Defendant overlooks the fact that the section provides that a refund may be made without a bond if it is shown that the tax was wholly borne and paid by the manufacturer. In such case no bond is necessary under subsection (a)(3)" (R. 13).

III. The Court of Claims has jurisdiction over suits to recover internal revenue taxes and Section 424(a) of the Revenue Act of 1928 does not in fact limit the jurisdiction of that Court to review the action and findings of the Commissioner of Internal Revenue.

The general jurisdiction of the Court of Claims over suits to recover internal revenue taxes has been long established.

> *United States* v. *Savings Bank,* 104 U. S. 728;
> *United States* v. *Kaufman,* 96 U. S. 567;
> *Cf. United States* v. *Emery, Bird, Thayer Realty Co.,* 237 U. S. 28.

The Court below found that the tax had not been passed on to Respondent's customers (Findings 7-9) (R. 18). Therefore, the primary requirement of section 424 has been met.

The question of jurisdiction under section 424(a) of the Revenue Act of 1928, has been raised in similar cases and the courts have sustained their jurisdiction.

Boyle Valve Co. v. *United States*, 38 Fed. (2d) 135;
Jefferson Electric Mfg. Co. v. *United States*, 38 Fed. (2d) 139;
Routzahn v. *Willard Storage Battery Co.*, 65 Fed. (2d) 89;
McCaughn v. *Electric Storage Battery Co.*, 63 Fed. (2d) 715, affirming 52 Fed. (2d) 205;
American Chain Co. v. *Eaton*, 58 Fed. (2d) 246.

The reasoning in the above decisions may be summarized as follows. The determination of whether the manufacturer's excise "tax was collected directly or indirectly from the purchaser"—namely—"added to the purchase price of the article", is an ordinary question of fact, one with respect of which the courts constantly review the Commissioner's determination and one that is involved in almost every suit for refund". Section 424(a) of the Revenue Act of 1928 as shown by the Report of the Ways and Means Committee of the House "deals not with rights of action, but with limitations upon the power of the Commissioner to make refunds", because it "nowhere refers to the plaintiff's right of action to recover taxes by litigation nor to the jurisdiction of the Court", in other words the section is not jurisdictional but "an administrative measure for the guidance of the Commissioner in the refund of taxes" and "does not purport to contain any provision prescribing conditions under which taxes may be collected by means of a suit".

In *Routzahn* v. *Willard Storage Battery Co.*, 65 Fed. (2d) 89, the Court said:

> * * * "Section 424(a) deals not with rights of action, but with limitations upon the power of the commissioner to make refunds. Its provisions are not in conflict with the general provisions of law authorizing suits for refund of taxes." * * *

> * * * "Reading the section literally, however, with the alternative provisions of its several paragraphs in mind, the purpose of the Congress to prevent the manufacturer from enriching himself by recovery of a tax that he has himself not paid, but has passed on to the consumer, appears in bold relief. It is also clear from the legislative record of the section" (p. 93).

In *McCaughn* v. *Electric Storage Battery Co.*, 63 Fed. (2d) 715, the Court said:

> "* * * This act refers to a refund of taxes by the Commissioner and not to a right of action by the taxpayer to recover taxes paid * * *" (p. 717).

In *Boyle Valve Co.* v. *U. S.*, 38 Fed. (2d) 135, the Court said:

> "The section provides in subdivision (2) that no refund shall be made unless it is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale of an article subject to tax, or, that the amount was not collected directly or indirectly from the purchaser, or that the amount, although collected from the purchaser, was returned to him. This is merely a requirement that the establishment of the fact required by the statute shall be necessary before any refund can be made. There is nothing discretionary in the Commissioner about it. The words 'to the satisfaction of the Commissioner' used in the act were inserted to make it clear that Congress intended that strict proof should be required. But this does not prevent a taxpayer upon the rejection of his refund claim from bringing suit to recover the tax alleged to have been erroneously or illegally collected, and, if he can do so, to establish to the satisfaction of the court whether he is entitled to a refund under the terms of the act. The case of Williamsport Wire Rope Co. v. United States, 277 U. S. 551, 48 S. Ct. 587, 72 L. Ed. 985, does not suppose the claim that section 424 makes the question whether an article sold is an automobile part or an accessory discretionary with the Commissioner. The determination whether the tax was collected by the manufacturer directly or indirectly

> from the purchaser; that is, whether it was added to the purchase price of the article upon the sale of which the tax was imposed, either as a separate item or as a part of the sales price, is an ordinary question of fact; one with respect of which the courts constantly review the Commissioner's determination and one that is involved in almost every suit for refund. It is a question of a type requiring no particular skill or knowledge of accountancy, but merely the ability to weigh evidence and to determine when to believe a witness" (p. 137).

Section 424 does not make the Commissioner's finding exclusive or conclusive nor does it take from the Courts the right to review his determination and find the ultimate facts, a function which they perform in reviewing the action of the Commissioner in nearly all tax suits.

Also in *Boyle Valve Co.* v. *U. S.*, 38 Fed. (2d) 135, the Court considered the report of the Ways and Means Committee of the House and the proviso of the Deficiency Act of December 22, 1927 and concluded that the stated purpose as shown by the report of the Committee was to prevent the refund of excise taxes to a manufacturer who had not paid the tax, but had passed it on to the consumer. The Court said:

> "* * * We think it is clear when the proviso of the deficiency act of December 22, 1927, section 424, Revenue Act of 1928, and the committee report are considered that what Congress intended was that in case such as we have here no refund of a tax of the character here involved should be made to a manufacturer unless it should be established that he had paid the tax and had not collected any portion thereof directly or indirectly from any one else who may have purchased the articles upon the sale or lease of which the tax was imposed" (p. 137).

A construction which would oust the jurisdiction of the Federal Courts in Internal Revenue tax cases would raise a serious question as to the constitutionality of the legislation, because:

1. General jurisdiction has been conferred upon the Federal Courts in suits arising under the internal revenue laws and those provisions are not expressly limited or repealed by Section 424 of the Revenue Act of 1928.

2. The Section would provide a limitation on suits as of April 30, 1928, thirty days prior to the passage of the Revenue Act of 1928 on May 29, 1928, which would violate the rule that in changing the period of limitations a reasonable time must be given by the new law for the bringing of an action before the bar takes effect.

3. The ousting of the jurisdiction of the Courts to determine whether taxes have been illegally collected and the vesting of that function exclusively in the Commissioner of Internal Revenue, clearly violates the due process provisions of the Fifth Amendment to the Constitution.

4. Petitioner's contention presents a clear case of encroachment by the Legislative branch on the functions of the Judicial branch which is prohibited by Section 1, Article III of the Constitution.

Clearly Section 424 is not expressly or by implication a limitation on the general jurisdiction of the courts to determine questions of fact in tax cases and to enter a judgment that the tax was erroneously and illegally collected.

The case of *Williamsport Wire Rope Co.* v. *United States*, 277 U. S. 551, involved the special relief provisions of the Revenue Act of 1918 and required a determination and computation based upon information facts and data peculiarly within the knowledge and keeping of the Commissioner and involving the tax returns of other taxpayers. Such information was not available to the Courts.

Section 327 applied to cases:

> "Where the Commissioner is unable to determine the invested capital as provided in Section 326:
>
> Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for

stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

Where * * * the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work * * * an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328."

Section 328 provided:

"In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances."

As this Court said in the *Williamsport Case*:

* * * "The task imposed on the Commissioner by §§ 327 and 328 was one that could only be performed by an official or a body having wide knowledge and experience with the class of problems concerned." * * * (p. 558).

"To perform that task, power, discretionary in character was necessarily conferred." * * *

* * * "The conclusions reached would rest largely upon considerations not entirely susceptible of proof or disproof" (p. 559).

Under Section 424 of the Revenue Act of 1928, of course, there is nothing of this character. The question whether the tax has been "passed on" to the customer is one of fact readily susceptible of proof and judicial determination.

IV. The special findings of fact by the Court of Claims are conclusive on appeal and sufficient to support the judgment.

Rule 38, Paragraph 3, of the Rules of this Court provides:

> "The special findings required by the two preceding paragraph shall be in the nature of a special verdict, and *shall set forth the ultimate facts found from the evidence*, but not the evidence from which they are found." (Italics supplied.)

The special findings of the Court below and the "ultimate facts" found are sufficient to support its judgment and fully comply with the foregoing rule of this Court.

> *Luckenbach S. S. Co.* v. *United States*, 272 U. S. 533.

In addition the Court below said in its opinion summarizing the evidence (2 Fed. Supp. 778, 780):

> "All of plaintiff's sales of ignition coils were taxed whether they were advertised for use on automobiles or not; the entire amount of excise tax paid during the period involved had been proved; *none of plaintiff's ignition coils were especially adapted for use in automobiles; none of plaintiff's ignition coils were sold by plaintiff to automobile manufacturers, dealers, or owners for use on automobiles; all* of plaintiff's ignition coils *were equally adapted for use on any internal-combustion engine*, and as the plaintiff sold to wholesalers, jobbers, mail order houses and dealers, *and as their use was general* in any kind of internal-combustion engine, it was not within plaintiff's knowledge to what particular use they were put" (R. 20). (Italics supplied.)

The findings of the Court below are conclusive on appeal.

> *Cramp & Sons, et al.* v. *United States*, 239 U. S. 221;
> *Hathaway* v. *United States*, 249 U. S. 460;
> *Keokuk & Hamilton Bridge Co.* v. *United States*, 260 U. S. 125;

Milliken v. *United States*, 283 U. S. 15;
United States v. *Anderson*, 269 U. S. 422;
Rogers v. *United States*, 270 U. S. 154;
United States v. *Swift & Co.*, 270 U. S. 124.

In *United States* v. *U. S. Fidelity and Guaranty Co.*, 236 U. S. 512, this Court said:

> "Assuming these defenses were properly pleaded, we still need spend no time upon them, since the argument made here to support them is based, not upon the findings, but upon a general review of the evidence and a series of inferences drawn from it that are inconsistent with the facts as found by the trial court. The findings have the same effect as the verdict of a jury, and this court does not revise them, but merely determines whether they support the judgment" (p. 527).

In *Anglo-American, etc., Co.* v. *Lombard*, 132 Fed. 721, Justice Van Devanter, then Circuit Judge, said:

> "In actions at law, where a trial by jury is waived, the duty of finding the facts is placed upon the trial court. We have no authority to examine the evidence for the purpose of finding the ultimate facts, or of correcting or completing a special finding which is imperfect or incomplete" (p. 734). (Citing cases.)

The findings of the Court of Claims were based upon extensive testimony taken before a Commissioner of the Court and upon his report to the Court. It is idle to speculate upon what particular evidence the Court based its ultimate findings because the findings speak for themselves. They are conclusive on appeal and are sufficient to support the judgment entered.

V. The counterclaim of the Government was properly dismissed because no evidence was presented in support of the claim.

Upon the findings of the Court below the dismissal of the counterclaim was proper, particularly since the Government offered no proof in support of its counterclaim and because there was no basis in fact for the counterclaim.

CONCLUSION.

The Court of Claims had jurisdiction to review the findings of the Commissioner of Internal Revenue and it is apparent from the facts found by the Court that the articles manufactured by the Respondent were not taxable as "parts" of an automobile and that the taxes were not passed on to Respondent's customers. The findings of the Court are sufficient to support its judgment and are conclusive on appeal.

The judgment of the Court of Claims should be affirmed and the motion to remand denied.

Respectfully submitted,

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November, 1933.

SUPREME COURT OF THE UNITED STATES.

Nos. 171, 196 and 329.—October Term, 1933.

171	The United States, Petitioner, *vs.* Jefferson Electric Manufacturing Company.	On Certiorari to the Court of Claims.
196	American Chain Company, Inc., Petitioner, *vs.* Robert O. Eaton, Collector, etc.	On Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
329	C. F. Routzahn, Collector, etc., Petitioner, *vs.* Willard Storage Battery Company.	On Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[February 12, 1934.]

Mr. Justice Van Devanter delivered the opinion of the Court.

These are actions at law brought—in one instance against the United States and in two against a revenue collector—to recover in each instance money alleged to have been erroneously and illegally exacted as an excise tax—under subdivision 3 of § 900 of the Revenue Acts of 1918[1] and 1921[2] and subdivision 3 of § 600 of the Revenue Act of 1924[3]—from the plaintiff, a corporate manufacturer, on sales by it of articles which the revenue officers regarded as automobile parts or accessories.

In No. 171[4] the Court of Claims awarded the plaintiff $20,017.58 with interest and denied a counter claim interposed by the United States. In No. 196[5] the District Court for the District of Connecticut gave the plaintiff judgments on three claims[6] for

[1] C. 18, 40 Stat. 1057, 1122.

[2] C. 136, 42 Stat. 227, 291.

[3] C. 234, 43 Stat. 253, 322.

[4] 69 Ct. Cls. 150; 38 F. (2d) 139; 2 F. Supp. 778.

[5] 58 F. (2d) 246, 248.

[6] Each claim was asserted in a separate suit, but the suits were tried together and after judgment were consolidated for purposes of appeal.

$329,250.00, $170,470.36 and $98,416.41 with interest on each sum; and the judgments were reversed by the Circuit Court of Appeals.[7] In No. 329[8] the District Court for the Northern District of Ohio rendered judgments for the plaintiff on five claims[9] for $89,195.36, $249,275.32, $189,853.88, $173,934.45 and $41,764.57 with interest on each sum; and the judgments were affirmed by the Circuit Court of Appeals.[10] The cases are here on certiorari.

After the taxes were collected, timely applications for refund were duly made by the plaintiffs, and the applications were denied. The actions were brought within the time generally limited therefor,[11] but not prior to April 30, 1928.

The applications for refund and the actions proceeded on the theory that the sales were not taxable under the Revenue Acts because the articles sold were not automobile parts or accessories within the meaning of those acts, and not on the theory that the amount collected was in excess of what was properly collectible on taxable sales.

In each case the court's authority to entertain the action and the plaintiff's right to recover were challenged in various ways as precluded by § 424 of the Revenue Act of 1928,[12] which provides:

"Sec. 424. REFUND OF AUTOMOBILE ACCESSORIES TAX.

(a) No refund shall be made of any amount paid by or collected from any manufacturer, producer, or importer in respect of the tax imposed by subdivision (3) of section 600 of the Revenue Act of 1924, or subdivision (3) of section 900 of the Revenue Act of 1921 or of the Revenue Act of 1918, unless either—

(1) Pursuant to a judgment of a court in an action duly begun prior to April 30, 1928; or

(2) It is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of an article subject to tax, or that such

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[7] 63 F. (2d) 783.

[8] For opinion overruling motion to dismiss action see 8 Am. Fed. Tax Reports 11274.

[9] Here again the several claims were asserted in separate suits, but the suits were tried together and after judgment were consolidated for purposes of appeal.

[10] 65 F. (2d) 89.

[11] 26 U. S. C. § 156.

[12] C. 852, 45 Stat. 791, 866; 26 U. S. C. § 2424.

amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him; or

(3) The Commissioner certifies to the proper disbursing officer that such manufacturer, producer, or importer has filed with the Commissioner, under regulations prescribed by the Commissioner with the approval of the Secretary, a bond in such sum and with such sureties as the Commissioner deems necessary, conditioned upon the immediate repayment to the United States of such portion of the amount refunded as is not distributed by such manufacturer, producer, or importer, within six months after the date of the payment of the refund, to the persons who purchased for purposes of consumption (whether from such manufacturer, producer, importer, or from any other person) the articles in respect of which the refund is made, as evidenced by the affidavits (in such form and containing such statements as the Commissioner may prescribe) of such purchasers, and that such bond, in the case of a claim allowed after February 28, 1927, was filed before the allowance of the claim by the Commissioner."

As respects actions brought on or after April 30, 1928, to recover taxes charged to have been wholly invalid and not merely in excess of what was lawful, which is the situation here, the construction and application of § 424, particularly subdivision (a) (2), are matters about which there has been much contrariety of opinion, as is shown in three lines of decision.

The decisions in the first line regard subdivision (a) (2) as committing all claims for the refunding of taxes of the class in question here to the Commissioner of Internal Revenue for final determination and precluding any examination of such claims in the courts. This view has been taken by District Judges in two cases[13] and by a Circuit Judge in a dissenting opinion in another case.[14]

The decisions in the second line are to the effect that the subdivision relates to administrative action by the Commissioner, but not to proceedings in the courts, and leaves a taxpayer who has applied to the Commissioner unsuccessfully free to sue on his claim and the courts free to entertain the suit and adjudicate the claim—as could

[13]Sterling Spring Co. *v.* Routzahn, Collector, VIII-2 Int. Rev. Cum. Bull. 258; Twentieth Century Manufacturing Co. *v.* Hopkins, Collector, X-2 Int. Rev. Cum. Bull. 408.

[14]McCaughn, Collector *v.* Electric Storage Battery Co., 63 F. (2d) 715, 718-719.

be and commonly was done before § 424 was enacted—save that under that section a judgment for the taxpayer in a suit brought on or after April 30, 1928, does not become obligatory or entitle him to the refund awarded by the judgment, unless and until (y) he satisfies the Commissioner that the tax was not collected directly or indirectly from the purchasers of the articles sold, or if so collected has been returned to the purchasers, or (z) gives the bond described in subdivision (a) (3). Such has been the ruling in two cases. In one the ruling was by the District Court for the Eastern District of Pennsylvania,[15] and the Circuit Court of Appeals for that circuit substantially sustained it, and in that connection said.[16] "This section clearly refers to a 'refund' of taxes by the Commissioner, and nowhere refers to the plaintiff's right of action to recover taxes by litigation nor to the jurisdiction of the court. In other words, this section is an administrative measure for the guidance of the Commissioner in the 'refund' of taxes, and does not purport to contain any provision prescribing conditions under which taxes may be collected by means of a suit". The other case is No. 329 now under review, where the ruling was by the District Court for the Northern District of Ohio[17] and was fully sustained

[15]Electric Storage Battery Co. *v.* McCaughn, Collector, 52 F. (2d) 205.

[16]McCaughn, Collector *v.* Electric Storage Battery Co., 63 F. (2d) 715, 718.

[17]For opinion overruling preliminary motion to dismiss see Willard Storage Battery Co. *v.* Routzahn, Collector, 8 Am. Fed. Tax Rep. 11274. After the hearing on the merits the court, in rendering judgment for the plaintiff, said:

"The objection to the court's jurisdiction founded on sec. 424 . . . has heretofore been ruled on. There is an error in that opinion where it is said that any refund after judgment would be pursuant to sub (3) of sec. 424 and would be conditional and for the benefit of consumers. If refunds are made, they may be under either sub (2) or (3), depending upon whether the plaintiff bore the tax or passed it on, etc. Those are matters for the Commissioner to decide; the court has nothing to do with them, and no evidence respecting them was offered.

"According to two recent decisions of the Court of Claims . . . the absence of such evidence should prevent recovery. But with great respect, I am unable to agree with the holdings on that point. I still think it is for the Commissioner alone to determine the facts necessary to be established as the basis of refunds under either sub (2) or (3). Where as here, taxes on sales not taxable have been collected, then on proof to the satisfaction of the Commissioner 'that such amount was not collected, directly, or indirectly, from the purchaser or lessee', or if collected has been returned, they may be refunded."

by the Circuit Court of Appeals for that circuit, as is shown by the following excerpts from its opinion:[18]

"Section 424(a) deals not with rights of action, but with limitations upon the power of the commissioner to make refunds. Its provisions are not in conflict with the general provisions of law authorizing suits for refund of taxes. [Citing cases.]

"We agree with the authorities above cited, not only in reliance upon familiar principles governing repeal by implication, but also because the section appears to us to have an obvious literal meaning perfectly applicable to refunds by the commissioner after judicial determination of the legality of the tax."

. . . . . .

"If the claim for refund is made pursuant to a judgment of the court in an action begun prior to April 30, 1928, the commissioner is not forbidden to refund under the applicable statute, and this may well be without qualification, although this we are not required to decide. Failing to bring himself within the condition of paragraph 1, because of not having pursued his claim to judgment in an action begun prior to the critical date, the taxpayer must establish to the satisfaction of the commissioner . . . (b) that such amount was not collected directly or indirectly from the purchasers, or (c) that such amount, although collected from the purchasers, was returned to them."

The decisions in the third line, like those in the second, regard the subdivision as neither cutting off the right of a taxpayer to sue for a refund after applying unsuccessfully to the Commissioner nor abrogating the authority of the courts to entertain the suit. But, unlike those in the second, they regard the subdivision as substantively limiting the right to a refund of taxes of the designated class to instances where the taxpayer either has not directly or indirectly collected the tax from the purchaser or after so collecting it has returned it to him. In other words, they regard the subdivision as making this substantive limitation an element of the right to a refund of such taxes, and therefore as requiring that this element, like others, be satisfactorily established in any proceedings where an asserted right to a refund is presented for examination and determination, whether the proceeding be before the Commissioner or be a suit brought after an application to him has been unavailing. The Court of Claims has so ruled in two cases,[19] one being No. 171 now under review; and the District

[18] Routzahn, Collector, v. Willard Storage Battery Co., 65 F. (2d) 89.

[19] Boyle Valve Co. v. United States, 69 Ct. Cls., 38 F. (2d) 135; Jefferson Electric Manufacturing Co. v. United States, 69 Ct. Cls. 150, 38 F. (2d) 139.

Court for the District of Connecticut came to a like conclusion in No. 196[20] also now under review.

We are of opinion that the view taken in the third line of decisions is right.

When § 424 was enacted the internal revenue laws contained many related provisions constituting what this Court has termed a comprehensive "system of corrective justice" in respect of the assessment and collection of erroneous or illegal taxes.[21] A summary of this system—it still is part of the internal revenue laws—will portray it sufficiently for present purposes. Anterior to collection the Commissioner possesses exclusive authority to revise, correct or reject assessments and the courts are forbidden to entertain suits "to restrain the assessment or collection." After collection aggrieved taxpayers are accorded a limited time within which to apply for refunds, and the Commissioner is authorized to grant the applications where the taxes are shown to have been erroneous or illegal; but a denial by him is not final. If the application is either denied or not acted on by the Commissioner the taxpayer is accorded a fixed period within which to bring suit for a refund against the United States or the collector who received the tax, and if in the suit he establishes that the tax was erroneous or invalid, that it was paid by him, and that his claim has been duly and seasonably presented and prosecuted, he is entitled to judgment for a refund of the amount paid with interest.[22]

As a general rule where the legislation dealing with a particular subject consists of a system of related general provisions indicative of a settled policy, new enactments of a fragmentary nature on that subject are to be taken as intended to fit into the existing system and to be carried into effect conformably to it, excepting as a different purpose is plainly shown.[23]

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[20]American Chain Co. *v.* Eaton, Collector, 58 F. (2d) 246; *Id.*, 248.

[21]Dodge *v.* Osborn, 240 U. S. 118, 120-121.

[22] 26 U. S. C. §§ 149, 154, 156, 157; 28 U. S. C. §§ 41 (5) (20), 250 (1), 284, 285, 286, 842; 31 U. S. C. § 225; Philadelphia *v.* Collector, 5 Wall. 720, 731-733; Nichols *v.* United States, 7 Wall. 122, 130-131; Cheatham *v.* Norvekl, Collector, 92 U. S. 85, 88-90; United States *v.* Hvoslef, 237 U. S. 1, 10; United States *v.* Emery, Bird, Thayer Realty Co., 237 U. S. 28, 31-32; Sage *v.* United States, 250 U. S. 33, 38-39; Moore Ice Cream Co. *v.* Rose, 289 U. S. 373.

[23]United States *v.* Barnes, 222 U. S. 513, 520, and cases cited; United States *v.* Sweet, 245 U. S. 563, 572; Panama R. R. Co. *v.* Johnson, 264 U. S. 375, 384.

That rule is applicable here. The existing system developed through long years of experience comprehends the entire subject, including all claims for refund. Section 424 is a new enactment and relates to a designated class of such claims, concededly within the scope of the existing system. Obviously the section is intended to make some change as respects the particular class and must be given effect accordingly; but to determine what change is intended it must be examined in the light of the existing system.

As respects claims of the designated class § 424 plainly prescribes, in subdivision (a) (2), an additional substantive element of the right to a refund—the additional element being that the taxpayer has not directly or indirectly collected the tax from the purchaser, or, after so collecting it, has returned it to him, so that the burden of the tax has been borne by the taxpayer and not the purchaser. Of subdivision (a) (3) it suffices to observe that it enables a taxpayer who has not borne the burden of the tax but has collected it from purchasers, and so is not entitled to a refund under subdivision (a) (2), to obtain from the Commissioner a qualified refund by giving a bond promptly to use the amount refunded in reimbursing the purchasers. No such bond has been given in the cases now before us and in all the right to judgment for a refund is rested on other facts independently of that.

Apart from the change already described we think subdivision (a) (2) discloses no purpose to depart from the existing system. It does not purport to commit the decision of claims for refund exclusively to the Commissioner, or to give finality to his denials, or to take from aggrieved claimants the right to sue on their claims after denial or inaction by him, or to withdraw from the courts the power to entertain such suits. As to these matters, therefore, the rules prescribed in the existing system remain, as before, both applicable and controlling.

The clause in that subdivision saying the additional element to which it relates is to be "established to the satisfaction of the Commissioner" is much relied on; but we think it does not require a different conclusion. Only by inadmissible straining could it be held to invest the Commissioner with absolute authority or discretion in respect of such refunds. A more rational view is that it is largely admonitive and means that the additional element is not lightly to be inferred but to be established by proof which

convinces in the sense of inducing belief. Such words often are so construed where applied to one who, like the Commissioner, is charged with the duty of ascertaining a matter of fact as a basis for further action.[24]

While the clause speaks only of the Commissioner, this becomes of minor significance when it is reflected that under the existing system he is the one to whom all claims for refund must be presented and on whom the duty of making an examination and decision is primarily placed, and that it doubtless was assumed—rightly we think—that under that system a taxpayer could by suit secure a judicial reexamination of his claim, and, if he did, the claim necessarily would be judged by the same substantive standards as if it were before the Commissioner. We say "necessarily", because subdivision (a) (2) says at the outset "No refund shall be made of any amount paid . . . unless", etc., and thus shows that it is to be applied by all who examine and determine claims for refunds—the courts as well as the Commissioner.

This view of the words "established to the satisfaction of the Commissioner" has support in a long continued practice under a similar provision in a customs law of 1864[25] under which certain customs duties, if paid under protest, were to be refunded to the importer when "shown to the satisfaction of the Secretary of the Treasury" to have been excessive. That provision remained in force many years,[26] and during that period was uniformly treated as neither investing the Secretary with final authority nor putting aside general provisions permitting suits for refunds, but as leaving the importer free, after an unavailing appeal to the Secretary, to sue under the general provisions and obtain a judicial reexamination of his claim.[27]

Some reliance is placed on *Williamsport Wire Rope Co.* v. *United States*, 277 U. S. 551; but that case is not in point. It was a suit for the refunding of excess-profits and war-profits taxes assessed under § 301 of the Revenue Act of 1918, and the question pre-

[24]Bryan *v.* Moore, 81 Ind. 9, 11-13; Kenyon *v.* City of Mondovi, 98 Wisc. 50, 54; Callan *v.* Hanson, 86 Iowa 426, 423; Sams Automatic Car Coupler Co. *v.* League, 25 Colo. 129, 135; Walker *v.* Collins, 59 Fed. 70, 74.

[25]C. 171, § 16, 13 Stat. 215, § 3012½ Rev. Stat.

[26]See c. 407, § 29, 26 Stat. 142; c. 6, § 28, 36 Stat. 104.

[27]See Arnson *v.* Murphy, 109 U. S. 238; Hagar *v.* Swayne, 149 U. S. 242; Schoenfeld *v.* Hendricks, 152 U. S. 691, 693; White *v.* Arthur, 10 Fed. 80, 88.

sented was whether in such a suit a refusal by the Commissioner to make a special assessment under §§ 327 (a) and (d) and 328 was open to reexamination. In answering the question in the negative, this Court referred to the purpose with which those sections provide for a special assessment, the language employed in expressing the conditions under which it is to be made, and the prescribed procedure; pointed out that the task involved is one requiring technical or special knowledge and experience in respect of such tax problems and ready access to data in the Bureau of Internal Revenue relating to a large group of taxpayers; and held that these exceptional conditions enforce the conclusion that Congress intended to confide the task to the Commissioner, subject only to a review by the Board of Tax Appeals where a direct appeal to that body is permitted, and thereby to exclude a reexamination in the courts such as in other situations is had in suits for refunds. It is very plain that no such exceptional conditions are involved in giving effect to subdivision (a) (2) of § 424.

As to the effect to be given to that subdivision in suits for refunds, we are of opinion that, as it makes the right to a refund to depend on an additional element—that the taxpayer has not collected the tax, directly or indirectly, from the purchaser, or, if it was so collected, has returned it to him—the courts in adjudicating claims of the designated class are under a duty to give effect to the subdivision by regarding the additional element as a matter to be shown by suitable allegation and established by appropriate proof, like other elements of such a right or cause of action, and by determining the sufficiency of pleadings and evidence accordingly.[28]

We cannot assent to the view that a court may give a judgment awarding the taxpayer a refund without inquiring whether he has borne the burden of the tax or has reimbursed himself by collecting it from the purchaser. That view rests on two untenable premises—one that the question whether the burden of the tax has thus been borne by the taxpayer is solely for administrative solution, and the other that a judgment for a refund may be given subject to the condition that it is to become obligatory and be given effect only if and when the claimant proves to the Commissioner that he alone has borne the burden of the tax. Our reasons for

[28] Kings County Savings Institution *v.* Blair, 116 U. S. 200, 205-206.

rejecting the first premise already have been shown. Those for rejecting the other will be shortly stated. A judgment so conditioned is merely a finding that the tax paid by the claimant was invalid, coupled with a declaration that it should be refunded to him if he proves to the Commissioner that in other respects he is entitled to it. Decisions of this Court have long since established that it is not within the province of courts created by or under the judiciary article of the Constitution to give or review judgments of that character, for they are not final or binding adjudications.[29] The District Courts are created and exist under that article. While the Court of Claims is created under a different article, the statute defining its jurisdiction of suits for refunds and those defining the jurisdiction of the District Courts are alike, in that both contemplate that the judgments in such suits shall fully and finally determine whether the claimants are entitled to the refunds for which they sue.

The contention is made that subdivision (a) (2), when construed and applied as we hold it should be, infringes the due process clause of the Fifth Amendment to the Constitution in that it strikes down rights accrued theretofore and still subsisting, but not sued on prior to April 30, 1928. This contention is pertinent, because the cases now being considered were begun after April 30, 1928, and in each the tax in question was paid before § 424 was enacted, which was May 29, 1928.

If the tax was erroneous and illegal, as is alleged, it must be conceded that, under the system then in force, there accrued to the taxpayer when he paid the tax a right to have it refunded without any showing as to whether he bore the burden of the tax or shifted it to the purchasers. And it must be conceded also that § 424 applies to rights accrued theretofore and still subsisting, but not sued on prior to April 30, 1928, and subjects them to the restriction that the taxpayer (a) must show that he alone has borne the burden of the tax, or (b), if he has shifted the burden to the purchasers, must give a bond promptly to use the refunded

[29]Hayburn's Case, 2 Dall. 409 and note; United States *v.* Ferreira, 13 How. 40 and note; Gordon *v.* United States, 2 Wall. 561; same case, 117 U. S. 697; United States *v.* Jones, 119 U. S. 477; In re Sanborn, 148 U. S. 222; La Abra Silver Mining Co. *v.* United States, 175 U. S. 423, 456-457; Muskrat *v.* United States, 219 U. S. 346.

sum in reimbursing them. But it cannot be conceded that in imposing this restriction the section strikes down prior rights, or does more than to require that it be shown or made certain that the money when refunded will go to the one who has borne the burden of the illegal tax, and therefore is entitled in justice and good conscience to such relief. This plainly is but another way of providing that the money shall go to the one who has been the actual sufferer and therefore is the real party in interest.

We do not perceive in the restriction any infringement of due process of law. If the taxpayer has borne the burden of the tax, he readily can show it; and certainly there is nothing arbitrary in requiring that he make such a showing. If he has shifted the burden to the purchasers, they and not he have been the actual sufferers and are the real parties in interest; and in such a situation there is nothing arbitrary in requiring, as a condition to refunding the tax to him, that he give a bond to use the refunded money in reimbursing them. Statutes made applicable to existing claims or causes of action and requiring that suits be brought by the real rather than the nominal party in interest have been uniformly sustained when challenged as infringing the contract and due process clauses of the Constitution.

The present contention is particularly faulty in that it overlooks the fact that the statutes providing for refunds and for suits on claims therefor proceed on the same equitable principles that underlie an action in assumpsit for money had and received. Of such an action it rightly has been said:[30]

"This is often called an equitable action and is less restricted and fettered by technical rules and formalities than any other form of action. It aims at the abstract justice of the case, and looks solely to the inquiry, whether the defendant holds money, which ex æquo et bono belongs to the plaintiff. It was encouraged and, to a great extent, brought into use by that great and just judge, Lord Mansfield, and from his day to the present, has been constantly resorted to in all cases coming within its broad principles. It approaches nearer to a bill in equity than any other common law action."

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[30]Claflin *v.* Godfrey, 38 Mass. 1, 6. To the same effect are Steuerwald *v.* Richter, 158 Wisc. 597, 604; Sanford *v.* First National Bank, 238 Fed. 298, 301; Portsmouth Cotton Oil Corporation *v.* Fourth National Bank, 280 Fed. 879, 882.

As our conclusion respecting the operation of subdivision (a) (2) is applicable both where the suit for a refund is against the United States and where it is against the collector, there is no need for considering the arguments advanced concerning the power of Congress to condition or withdraw the consent of the United States to be sued.[31]

We come now to consider and dispose of the three cases and to apply to them our conclusions respecting the construction and operation of subdivision (a) (2) of § 424.

No. 171.

In the petition the plaintiff alleged that it absorbed the taxes in question and paid the same from its own funds; that no other person or persons paid the same either directly or indirectly; and that no other person or persons has any right either at law or in equity to the refund sought or any part of it. The defendant's answer was a general traverse accompanied by a counter-claim based on an alleged allowance and payment to the plaintiff, through error and mistake, of certain claims for the refunding of like taxes aggregating $69,264.66. The Court of Claims made special findings of fact whereon it gave judgment for the plaintiff. The findings show that the taxes in question were assessed on sales by the plaintiff of ignition coils which the revenue officers regarded as parts or accessories for automobiles, but which the court regarded as equally adapted to other uses not comprehended in the taxing acts; and that the taxing period in question began with May, 1919, and continued to the end of February, 1926. Pertinent portions of the findings are as follows:

"7. For the taxable period in question . . . plaintiff, in the sale of ignition coils, invoiced its catalogue prices to all customers, and did not add thereto any amounts representing excise taxes, or collect from its customers amounts additional to the catalogue prices. The catalogue prices so invoiced and collected were transferred by plaintiff to its general ledger account in totals without separation into any elements, such as tax, charges for parcel post, insurance. The excise tax which it considered payable was set up in an additional account styled 'Excise Tax Expense'.

[31] See Darrington *v.* Bank of Alabama, 13 How. 12, 17; Beers *v.* Arkansas, 20 How. 527, 529; In re Ayers, 123 U. S. 443, 505; Hans *v.* Louisiana, 134 U. S. 1, 17-18; United States *v.* Heinszen & Co., 206 U. S. 370, 391 (Harlan, J.); Graham & Foster *v.* Goodcell, 282 U. S. 409, 430-431.

"8. For a part of the taxable period in question plaintiff made on its invoices to customers certain notations with respect to the excise tax which it considered applicable.

"Up to May 19, 1923, plaintiff made no such notations on its invoices to customers.

"Beginning May 19, 1923, up to December 29, 1925, it was plaintiff's practice to note on its invoices to customers the following: 'On automotive accessories 1/21 of amount indicated herein equals 5% excise tax. 20/21 of amount indicated equal price,' during the period when the 5% tax rate was in effect, and substantially the same notation during the period when the 2½% rate was in effect, '1/21' being changed to '1/41' and '20/21' to '40/41'. It does not definitely appear what the practice was thereafter as to notations on invoices.

"9. Plaintiff's catalogue prices were not increased or decreased by reason of the imposition of the excise tax on automobile parts or accessories.

"10. It is not possible from the state of the record to determine the amount of excise tax paid for the period when plaintiff made the aforesaid tax notations on invoices sent to its customers."

These findings, which are all that bear on the question of who paid the taxes and bore the burden thereof, are wanting in precision and apparently conflicting. If findings 7 and 9 were not otherwise qualified they might be regarded as meaning that the sales were at catalogue prices and that these prices did not include, and the purchasers did not pay, the tax or any part of it. But finding 8 makes it at least doubtful that findings 7 and 9 have that meaning, for it is plainly inferable from finding 8 that during much of the taxing period the plaintiff sold on invoices bearing notations indicating that when the tax was 5% of the selling price 1/21 of the amount shown on the invoice represented the tax and 20/21 represented the selling price; and that when the tax was 2½% of the selling price the fractions were changed to 1/41 and 40/41. The findings leave it uncertain whether the plaintiff in making its returns to the revenue officers gave the amount shown on the invoices or 20/21 (later 40/41) of that amount as the selling price; and they also leave it uncertain on which basis the tax was computed. If by its invoices the plaintiff represented to its purchasers that the amount shown thereon included the tax as well as the selling price, and if it returned that amount less the tax as the selling price, and caused the tax to be computed on that basis, it can not be heard to say, in the absence of other controlling circumstances of which there is no finding, that it did not collect the tax from the purchasers but itself bore the burden thereof.

Because of the uncertainty and apparent conflict in the findings the judgment must be reversed and the cause remanded to the Court of Claims for a new trial and full and specific findings.

No. 196.

This case comprises three separate suits, designated in the District Court as Nos. 3360, 3371 and 3421, which were tried together and, after judgments for the plaintiff, were consolidated for purposes of appeal. They were tried to the court under a stipulation in writing waiving a jury. The court made special findings of fact on which it based its judgments. In the complaints the plaintiff alleged that the tax was not paid directly or indirectly by the purchasers, but entirely by the plaintiff; that the sales were at a flat price and no amount for the tax was included therein; and that the plaintiff absorbed the tax. These allegations and some others were denied by the defendant in his answer. In various ways the defendant challenged the plaintiff's right to sue for a refund and the court's power to entertain such a suit, the challenge being grounded on subdivision (a) (2) of § 424; and the court held the challenge was not tenable. At the conclusion of the evidence the defendant moved for judgments thereon in his favor, and the motion was denied.

The Circuit Court of Appeals reexamined the evidence, concluded therefrom, contrary to the findings of the District Court, that the articles on sales of which the tax was assessed were accessories for the taxable vehicles enumerated in the taxing acts, and on that ground sustained the tax and reversed the judgments, without considering the rulings relating to subdivision (a) (2) of § 424.

The questions presented for consideration here are those involved in the rulings of the District Court and that involved in the reversal by the Circuit Court of Appeals on a reexamination of the evidence. The challenge of the plaintiff's right to sue for a refund and of the court's power to entertain such a suit was rightly overruled. This is sufficiently shown in the earlier part of this opinion. Whether the District Court erred in denying the defendant's motion at the conclusion of the evidence for judgments thereon in his favor must be determined by ascertaining whether there was substantial evidence fairly tending to establish every element of the plaintiff's causes of action. We think there was such evidence. There was conflict in it; parts of it admitted of diverging infer-

ences; and as to some matters the preponderating weight was difficult of ascertainment. But these were all matters for the trial court to determine. It was exercising the functions of a jury and its findings are on the same plane as if embodied in a jury's special verdict.[32] We are accordingly of opinion that the motion was rightly overruled, and that the Circuit Court of Appeals erred in not so holding. Even if there was some basis for thinking the weight of the evidence was with the defendant, as was strongly urged at our bar, it was not within the province of that court to reexamine the evidence and reverse the judgments because of what it regarded as error of fact.[33]

Whether the special findings give the requisite support to the judgments rendered thereon is a different question and is one which is open to consideration here.[34] The findings are long and the view which we take of one of them makes it unnecessary to state the others. The one relates to the matter made essential by subdivision (a) (2) of § 424, and is the only finding on the subject. It reads as follows:

"Paragraph 5 of the complaint alleged that the taxes in question were paid entirely by the plaintiff, and neither directly nor indirectly by the plaintiff's purchasers. These allegations also were denied.

"As to this issue, I find that for the taxable period involved in case No. 3371, the plaintiff has sustained the burden of proof. The evidence on this issue relating to the periods involved in cases Nos. 3360 and 3421, disclosed that the plaintiff at some time during the period between January 1 and December 31, 1923, reduced its sale prices by the amount of the tax and so stamped its invoices and bills as to indicate that of the amount charged to the customer 1/21 part was required by the sales tax in question. Thereafter the plaintiff computed and paid the excise tax upon the basis of the price thus reduced, thereby saving to itself the payment of a tax upon a tax, 5 per cent on 5 per cent. The arrangement cost the customer nothing, as he paid in the aggregate just what he had paid before. Consequently the plaintiff did not thereby pass the economic burden of the tax to its purchasers. However, since under this arrangement the invoices indicated the 1/21 of the amount billed was for the tax, I am constrained to con-

[32] 28 U. S. C. § 773; Copelin *v.* Insurance Co., 9 Wall. 461; Dooley *v.* Pease, 180 U. S. 126, 131.

[33] 28 U. S. C. § 879; Martinton *v.* Fairbanks, 112 U. S. 670, 672; Davis *v.* Schwartz, 155 U. S. 631, 636; Law v. United States, 266 U. S. 494, 496.

[34] 28 U. S. C. § 875.

clude that the balance, 20 21, was the real sale price, especially since the tax was thereafter paid on that basis. This requires the conclusion of fact that in legal effect the tax was collected from the purchaser. But in view of the fact that the sales prices in vogue prior to the inauguration of this arrangement were thereafter reduced by the amount of the tax, I find further that in so far as the tax was collected from purchasers, it was wholly returned to them."

Saying that the plaintiff has sustained the burden of proof as to the designated issue in suit No. 3371 is not an adequate finding of the matters of fact involved in that issue, particularly where, as here, the subject is new and may admit of differing opinions. It is in the nature of a legal conclusion rather than a finding of the underlying facts, and we think it does not adequately respond to the issue and is not sufficient to support the judgment which rests on it.

That which follows relates to suits Nos. 3360 and 3421 and evidently means that the plaintiff by its invoices was indicating to the purchasers that 1/21 of the amount it was collecting from them represented the tax on the sales and 20/21 represented its "real sales price"; and that the plaintiff itself computed the tax on the basis of this "real sales price" and thereafter paid the tax as so computed, thereby saving to itself the difference between the tax resulting from that computation and the tax which would have resulted had the full amount collected from the purchasers been used as the basis for the computation. If that be what is meant, the court rightly concluded that the tax was collected from the purchasers. It is of no importance that the prior sales price had been reduced by the amount of the tax, for under the taxing act the tax was to be computed on the price for which the articles actually were sold and not on some prior and discarded price. But the court's further conclusion that, as the price theretofore in vogue was reduced by the amount of the tax, the plaintiff in effect returned to the purchasers the tax it collected from them—because they got the articles for a price which was that much less than it would have been had the prior sales price been still in vogue—is shown by its mere statement to be not a finding of fact but unsatisfactory reasoning having little tendency to establish its objective. That conclusion must therefore be disregarded. It results that the finding, while showing that the plaintiff collected the tax from the purchasers, does not show whether it returned the tax to them.

Thus the finding does not adequately respond to the issue arising on the plantiff's allegation that it absorbed the tax—for, having collected it from them, the plaintiff could absorb it only by returning it to them. With that matter left in this situation the finding plainly does not support the judgments which rest on it.

As the judgments of the District Court in the three suits must be reversed because of insufficiencies in the special findings, and as the reversal by the Circuit Court of Appeals was put on an untenable ground, we deem it the better course to enter here a judgment reversing the judgments of both courts and remanding the suits to the District Court with a direction to vacate its findings and grant a new trial in each suit.

No. 329.

This case comprises five separate suits which were tried together and, after judgments for the plaintiff, were consolidated for purposes of appeal. The trial was to the court under a written stipulation waiving a jury. The court made special findings and based its judgments on them. At the outset the plaintiff's right to recover on the facts stated in the petitions was challenged by the defendant by motions to dismiss and the motions were overruled. There were also motions at the close of the evidence for judgments thereon in favor of the defendant which also were overruled. These rulings and the sufficiency of the facts found to support the judgments are the matters presented for consideration here. There was neither allegation nor proof that the plaintiff had not collected the tax from the purchasers, or after so collecting it had returned it to them; and of course there was no finding on the subject. The suits proceeded throughout as if that question was one for administrative solution after judgment, if the plaintiff prevailed. What we have said in the earlier part of this opinion shows that this was a mistaken theory. The judgments in both courts below must be reversed accordingly and the causes remanded to the District Court with directions to set aside the findings, and to sustain the motions to dismiss—but without prejudice to the exercise by that court of its discretion in permitting amendments of the petitions.

Our conclusions in Nos. 171, 196 and 329 when summarized require that the judgments in all be reversed and the causes remanded with directions as before indicated.

Judgments reversed.